NEW REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS,

FROM MICHAELMAS TERM, 46 GEO. III. 1805,
TO TRINITY TERM, 47 GEO. III. 1807,

BOTH INCLUSIVE.

With Tables of the Cases and Principal Matters contained in Bosanquet and Puller's and in the New Reports.

By JOHN BERNARD BOSANQUET,
OF LINCOLN'S INN, Esq. BARRISTER AT LAW.
AND CHRISTOPHER PULLER,
OF THE INNER TEMPLE, Esq. BARRISTER AT LAW.

Ut non difficile si[illegible] ua cunque nova causa, consultatione acciderit, ejus tenere jus.
CIC DE LEG.

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A

TABLE

OF THE

NAMES OF THE CASES

REPORTED in BOSANQUET and PULLER'S,

And in the NEW REPORTS.

N. B. Those Cases, of which the Names are printed in *Italics*, with the Letter *n* added to the Figures denoting the Pages, were cited from MS. Notes.

A.

ABBOTT *v.* Rawley, 3B.&P. *page* 13
Abel, Mark *v.* 3B.&P. 35
Abercromby, Madox v. 2B.&P. 389. *n.*
Abercrombie *v.* Parkhurst, 2B.&P. 480
Ablett *v.* Ellis, 1B.&P. 249
Abraham, Atkinson *v.* 1B.&P. 175
Adam *v.* Kerr, 1B.&P. 360
——, Dicker *v.* 2B.&P. 163
Adderley *v.* Hart, 1B.&P. 394 cited *in notis.*
Adney, Wennall *v.* 3B.&P. 247
Alan, Steel *v.* 2B.&P. 362. 437
Alderton, Harrow School *v.* 2B.&P. 86
Alexander, Hamer *v.* 2N.R. 241
Allen, Neat *v.* 1B.&P. 21
Allingham *v.* Flower, 2B.&P. 246
All Souls' College *v.* Costar, 3B.&P. *page* 635
Almgill *v.* Pierson, 1B.&P. 103
Amatt, Cartwright *v.* 2B.&P. 43
Ames *v.* Hill, 2B.&P. 150
Anderson, Camden *v.* 1B.&P. 272
——, Hammond *v.* 1N.R. 69
—— *v.* May, 2B.&P. 237
—— *v.* Noah, 1B.&P. 31
—— *v.* Pitcher, 2B.&P. 164
Anderton, Newman *v.* 2N.R. 224
Andrè, Holward *v.* 1B.&P. 32
Andrew (Doe d.) *v.* Hutton, 3B.&P. 643
Andrew *v.* Pearse, 1N.R. 158
Angerstein v. *Vaughan*, 1B.&P. 222. *n.*
Annis, Fulwood *v.* 3B.&P. 321
Anscombe (Blaker *v.*) 1N.R. 25
Ansell, *Ex parte* 1B.&P. 62

Ansell, Vaux *v.* 1 B.&P. *page* 224
Ansley and Others, Bland *v.* 2N.R. 331
Anstey [illegible]arden, 1N.R. 124
Anthill *q. t.* *v.* Metcalf, 2N.R. 169
Arbuckle [illegible] Cowtan, 3B.&P. 321
Archer, [illegible]d. Potter *v.* 1B.&P. 531
——— *v. Dudley,* 1B.&P. 381 *n.*
Armstrong *v.* Smith, 1N.R. 299
Armytage, Jones *v.* 2B.&P. 38
Arrowsmith, Wallace *v.* 2B.&P. 49
——————— *v.* Le Mesurier, 2N.R. 211
Arundell (Lord), Hosier *v.* 3B.&P. 7
Ashley, Bowen *v.* 1N.R. 274
———, Stables *v.* 1B.&P. 49
Askew *v.* Mackreth, 1N.R. 211
Aslett, The King *v.* 1N.R. 1
Aspinall v. *Pickford,* 3B.&P. 44 *n.*
Astley, (Sir J.) Harwood *v.* 1N.R. 47
——— *v.* Weldon, 2B.&P. 346
Atkins *v.* Wheeler, 2N.R. 205
Atkinson *v.* Abraham, 1B.&P. 175
——— *v.* Newton, 2B.&P. 336
Attorney General v. *Bowman.* 2B.&P. 532 *n.*
Atty *v.* Lindo, 1N.R. 236
——— *v.* Parish, 1N.R. 104
Aubert *v.* Maze, 2B.&P. 371
Audley *v.* Duff, 2B.&P. 111
Auckland (Lord), Lord Petre *v.* 2B.&P. 139
Aylwin *v.* Favine, 2N.R. 430
Ayre *v.* Davenport, 2N.R. 474

B.

Baddam, Doe d. *v.* Roe, 2B.&P. 55
Badley *v.* Loveday, 1B.&P. 81
Badtitle, Goodtitle, d. Read *v.* 1B.&P. 381
———, Goodtitle d. Roberts *v.* 1B.&P. 385
———, Goodtitle d. Wanklen *v.* 2B.&P. 120
Baggott *v.* Orr, 2B.&P. *page* 472
Bagshaw, Fulham *v.* 1B.&P. 292
Bailey, Doe d. *v.* Roe, 1B.&P. 369
——— *v.* Hantler, 2B.&P. 126
Baillie, Gardner *v.* 1B.&P. 32
Baker, Handcock *v.* 2B.&P. 260
Balch *v.* Phelps, 3B.&P. 366
Ball, Mills *v.* 2B.&P. 457
———, Stewart *v.* 2N.R. 78
———, Willows *v.* 2N.R. 376
Ballard, Jelfs *v.* 1B.&P. 467
Bamford *v.* Burrell, 2B.&P. 1
Banks, Doe d. *v.* Booth, 2B.&P. 219
Bannatyne, Sparenburgh *v.* 1B.&P. 163
Banning *v.* Perry, 2B.&P. 69
Baptiste *v.* Cobbold, 1B.&P. 7
Barclay, Smith *v.* 3B.&P. 219
Bargus, Holin *v.* 2B.&P. 42
Baring *v.* Clagett, 3B.&P. 201
Barker, Grindley *v.* 1B.&P. 229
Barnard *v.* Berger, 1N.R. 121
——— *v.* Gostling, 1N.R. 245
——— *v. Knowerthy,* 1B.&P. 73 *n.*
Barnes, Vaughan *v.* 2B.&P. 392
Barnfield, Doe d. *v.* Wetton, 2B.&P. 324
Barret, Nation *v.* 2B.&P. 30
Barrow, Owen *v.* 1N.R. 101
Barrs *v.* Digby, 1N.R. 281
Barry *v.* Robinson, 1N.R. 293
Barter, Seale *v.* 2B.&P. 485
Bartholomew, Williams *v.* 1B.&P. 326
Batchellor, Cook *v.* 3B.&P. 150
Batten *v.* Harrison, 3B.&P. 1
Bauwens, Sykes *v.* 2N.R. 404
Bayley *v.* Tucker, 2N.R. 458
———, Walker *v.* 2B.&P. 219
Baylis *v.* Manning, 1N.R. 238
———, Parker *v.* 2B.&P. 73
Beale *v.* Thompson, 3B.&P. 405
Bean, Kenman, *v.* 2N.R. 433
Beard *v.* Webb, 2B.&P. 93
Beardmore *v.* Shaw, 1N.R. 263
Beauclerck (Ld. Wm.) Kenrick *v.* 3B.&P. 175

Beddome v. *Holbrook*, 1B.&P. *page* 450 *n.*
Bell, Chalmers *v.* 3B.&P. 604
—— *v.* Da Costa, 2B.&P. 446
—— *v.* Gilson, 1B.&P. 345
—— *v.* Stone, 1B.&P. 331
Bendelack, *Tabbs* v. 3B.&P. 207 *n.*
Bennett *v.* Francis, 2B.&P. 550
———, Hope *v.* 2N.R. 397
———, Whitwell *v.* 3B.&P. 559
Benton *v.* Sutton, 1B.&P. 21
Berger, Barnard *v.* 1N.R. 121
———, Weddall *v.* 1B.&P. 325
Bicknell *v.* Keppel, 1N.R. 20
Biggs, Lingham *v.* 1B.&P. 82
Birch, Dyson *v.* 1B.&P. 4
v. Litchfield, (Bishop of) 3B.&P. 444
—— *v.* Prodger, 1N.R. 135
Birkenshaw, Marshall *v.* 1N.R. 172
Birkhead, Sangster *v.* 1B.&P. 303
Birks, Haynes *v.* 3B.&P. 599
Bishop *v.* Young, 2B.&P. 78
Blaker *v.* Anscombe, 1N.R. 25
Blakey *v.* Dixon, 2B.&P. 321
Blanchard, Fenn d. *v.* Wood, 1B.&P. 373
———, Kitchin *v.* 1B.&P. 378
Bland *v.* Ansley and Others, 2N.R. 331
Blight v. *Page*, 3B.&P. 295 *n.*
Blyth *v.* Harrison, 1B.&P. 535
Blyton, Copous *v.* 1N.R. 67
Bolt, Miller *v.* 2B.&P. 420
Bolton, Mayor and Burgesses of Stafford *v.* 1B.&P. 40
———, Long *v.* 2B.&P. 909
Paller, 1B.&P. 539
Bond, Wright *v.* 2N.R. 125
Booth, Doe d. Banks *v.* 2B.&P. 219
—, Jeyes *v.* 1B.&P. 97
Borrowdale, Gandy *v.* 1N.R. 273
———— *v.* Hitchener, 3B.&P. 214
Bostock, Wardens of St. Saviour's, Southwark, *v.* 2N.R. 175
Botham, Loveridge *v.* 1B.&P. *page* 49
Bothell, Doe d. *v.* Martyr, 1N.R. 332
Boulcott, Brand and Another *v.* 3B.&P. 235
Bourdillion, Scott *v.* 2N.R. 213
Bovil, Driscol *v.* 1B.&P. 313
Bowen *v.* Ashley, 1N.R. 274
Bowes *v.* Bowes, 2B.&P. 500
Bowman, *Attorney General* v. 2B.&P. 532. *n.*
Bowring *v.* Edgar, 1B.&P. 270
Boxall, Iles *v.* 2B.&P. 89
Boyle, Fenton *v.* 2N.R. 399
Boyne, Dickenson *v.* 1B.&P. 335
Braddick, Fletcher *v.* 2N.R. 182
Bradley *v.* Tunstow, 1B.&P. 34
Brady, The King *v.* 1B.&P. 187
Brand *v.* Boulcott, 3B.&P. 235
Brandon *v.* Brandon, 1B.&P. 394
———, Flint *v.* 1N.R. 73
———, Hollis *v.* 1B.&P. 36
Brant, *Langloie* v. 2B.&P. 433 *cit. in notis.*
Breedon, Williams *v.* 1B.&P. 329
Briddon et Ux. (*Denn d.*) v. *Page*, 1B.&P. 261. *n.*
Brigden *v.* Parkes, 2B.&P. 424
Brigham, Goodill *v.* 1B.&P. 192
Briscoe, Doe d. *v.* Clarke and Wife, 2N.R. 343
Bristow, Turner *v.* 2B.&P. 38
———, Waddington *v.* 2B.&P. 452
——— and Others *v.* Waddington and Others, 2N.R. 355
Broderick, *Johnson* v. 3B.&P. 406. *n.*
Bromfield *v.* Crowder, 1N.R. 313
Bromley *v.* Coxwell, 2B.&P. 438
Brooke *v.* White, 1N.R. 330
Brooker *v.* Simpson, 2B.&P. 336
Broomhead, Hankin *v.* 3B.&P. 607
————, Redit *v.* 2B.&P. 564
Broughton *v.* Martin, 1B.&P. 176
Brown *v.* Kewley, 2B.&P. 518
——, Pell *v.* 1B.&P. 369
——, Rice *v.* 1B.&P. 39

Brown, Tingrey *v.* 1B.&P. *page* 310
——, Williams *v.* 3B.&P. 69
Brown *v.* Wright, 2B.&P. 13
Bruce v. *Bruce*, 2B.&P. 229 *n.*
Bryan, Cobb *v.* 3B.&P. 348
Bryson v. *Wylie*, 1B.&P. 83 *n.*
Bucher *v.* Jarratt, 3B.&P. 143
Buck d. Whalley *v.* Nurton, 1B.&P. 53
Buckel, Fenn d. *v.* Roe, 1N.R. 293
Buckinghamshire (Earl of) Goodright d. *v.* Marquis of Downshire, 2B.&P. 600
Buckler *v.* Rawlins, 3B.&P. 111
Buckworth v. *Thirkell*, 3B.&P. 652 *n.*
Bulcock, Maddocks *v.* 1B.&P. 325
Bull *v.* Tilt, 1B.&P. 199
Bullock, Butchers' Company *v.* 3B.&P. 434
——, Dyer *v.* 1B.&P. 344
Bulpit *v.* Clarke, 1N.R. 56
Burbige *v.* Jakes, 1B.&P. 225
Burfield *v.* Duchess de Pienne, 2N.R. 380
Burgess *v.* Freelove, 2B.&P. 425
Burnsall *v.* Davy, 1B.&P. 215
Burrel, Bamford *v.* 2B.&P. 1
Burrell *v.* Dodd, 3B.&P. 378
Burton, Ratcliffe *v.* 3B.&P. 223
Bush *v.* Steinman, 1B.&P. 404
Butcher *v.* Butcher, 1N.R. 113
Butchers' Company *v.* Bullock, 3B.&P. 434
Butler, Singleton *v.* 2B.&P. 283
——, Southey *v.* 3B.&P. 237
——— *v* Woolcott, 2N.R. 64
Butterfield, Williamson *v.* 2B.&P. 63

C.

Cadell, Murphy *v.* 2B.&P. 137
Calliand *v.* Vaughan, 1B.&P. 210
Camden *v.* Anderson, 1B.&P. 272
Cappadose *v.* Codner, 1B.&P. 483
Carpenter *v.* Marnell, 3B.&P. 40
Carr, M'Collam *v.* 1B.&P. 223
Carter, Moffat *v.* 2N.R. 75
Cartwright *v.* Amatt, 2B.&P. 43
Cartwright, *Dakin* v. 1B.&P. *page* 572. *n.*
Castle, Pariente *v.* 2B.&P. 163
——- and Another, Goodtitle ex dem. *v.* White, 2N.R. 383
Castleman *v.* Ray, 2B.&P. 383
Cator *v.* Hoste, 2B.&P. 557
Cawthorne *v.* Holben, 1N.R. 279
Cazalet *v.* Dubois, 1B.&P. 81
Chalmers *v.* Bell, 3B.&P. 604
Chamberlain *v.* Porter, 1N.R. 30
Champion *v.* Plummer, 1N.R. 252
Chapman *v.* Eland, 2N.R. 82
——— *v.* Koops, 3B.&P. 289
——— *v.* Partridge, 2N.R. 382
———, Rushton *v.* 2B.&P. 340
——— *v.* Snow, 1B.&P. 132
Charlwood *v.* Morgan, 1N.R. 64
Chaters, Gibson *v.* 2B.&P. 129
Chatterley *v.* Finck, 2B.&P. 390
Chaunt *v.* Smart, 1B.&P. 477
Chetham *v.* Ward, 1B.&P. 630
Chetwind *v.* Marnell, 1B&P. 271
Child, doe d. Wright and Others *v.* 1N.R. 335
Chippendale, Davis *v.* 2B.&P. 282. 367
Christie, Fawcett *v.* 2B.&P. 515
———, Watson *v.* 2B.&P. 224
Chune, Jones *v.* 1B.&P. 363
Clagett, Baring *v.* 3B.&P. 201
Clark *v.* Devlin, 3B.&P. 363
Clarke and Wife, Doe d. Briscoe and Others *v.* 2N.R. 343
Clarke, Bulpit *v.* 1N.R. 56
——-, Da Costa *v.* 2B.&P. 257. 376
——- *v.* Reed, 1N.R. 310
Clay, Jones *v.* 1B.&P. 191
Clegg *v.* Cotton, 3B.&P. 239
Clempson *v.* Knox, 2B.&P. 516
Clifton *v.* Gerrard, 1B.&P. 524. 659
——— (Sir Jervas), Rogers *v.* 3B.&P. 587
Coare, Foot *v.* 2B.&P. 588
Cobb *v.* Bryan, 3B.&P. 348
—— *v.* Selby, 2N.R. 466
Cobbold, Baptiste *v.* 1B.&P. 7
Cobourne, Symonds *v.* 1B.&P. 482

Cockburn (Sir J.), Laidlaw *v.* 2N.R. *page* 76
Codnor, Capadose *v.* 1B.&P. 483
Cohen, Losemore *v.* 1N.R. 279
Coker *v.* Guy, 2B.&P. 565
Colclough *v.* Corden, 2N.R. 431
Coleman, Howell *v.* 2B.&P. 466
Collett *v.* Thompson, 3B.&P. 246
Collins *v.* Jacobs, 3B.&P. 579
——— *v.* Martin, 1B.&P. 648
——— *v.* Rowed, 1N.R. 54
———, Thompson *v.* 1N.R. 347
Comber *v.* Hardcastle, 3B.&P. 115
Constable, Walker *v.* 1B.&P. 306
Constantine *v.* Pugh, 3B.&P. 184
Cook *v.* Batchellor, 3B.&P. 150
—— *v.* Loveland, 2B.&P. 31
Cooke, Gerrard *v.* 2N.R. 109
——, Le Grew *v.* 1B.&P. 332
——— *v.* Ludlow, 2N.R. 119
——— *v.* Munstone, 1N.R. 351
———, Rothwell *v.* 1B.&P. 172
Copeland, Holford *v.* 3B.&P. 129
Copous *v.* Blyton, 1N.R. 67
Corden demandant, Hill tenant, and Colclough vouchee, 2N R. 431
Costar, All Souls' College *v.* 3B.&P. 635
Cotton, Clegg *v.* 3B.&P. 239
Cousins, Miller *v.* 2B.&P. 329
Covington *v.* Roberts, 2N.R. 378
Cowell *v.* Edwards, 2B.&P. 268
———, Leominster Canal Company *v.* 1B.&P. 213
Cowtan, Arbuckle *v.* 3B.&P. 321
Cox *v.* Kitchen, 1B.&P. 338
—— *v.* Morgan, 2B.&P. 398
Coxwell, Bromley *v.* 2B.&P. 438
Craig, Nurse *v.* 2N.R. 148
Crawfurd, Lucena *v.* 3B.&P. 75
——————— 2N.R. 269
——— *v.* Phillips, 2N.R. 141
Creasy, Jarratt *v.* 3B.&P. 603
Crickett, Riblans *v.* 1B.&P. 264
Crocker, The King *v.* 2N.R. 87
Crooks *v.* Holditch, 1B.&P. 176
Cross *v.* Pead, 1B.&P. 137
Crowder, Bromfield *v.* 1N.R. *page* 313
——— *v.* Wagstaff, 1B.&P. 18
Culliford, Holsten *v.* 1B.&P. 214
Cumberland, Inhabitants of, *v.* The King 3B.&P. 354
Cunningham *v.* Mackenzie, 2B.&P. 598
Curling *v.* Long, 1B.&P. 634
Curry *v.* Walter, 1B.&P. 525
Cuthbert, Goggerley *v.* 2N.R. 170
Cutlers' Company, Doe d. *v.* Hogg, 1N.R. 306
Cutts, Jenny d. Preston *v.* 1N.R. 308

D.

Da Cossen, Judine *v.* 1N.R. 234
Da Costa, Bell *v.* 2B.&P. 446
——— *v.* Clarke, 2B.&P. 257. 376
——— *v.* Davis. 1B.&P. 242
Dacre, Doe d. *v.* Dacre, 1B.&P. 250. 659
Dahl *v.* Johnson, 1B.&P. 205
Dakin v. *Cartwright*, 1B.&P. 572 *n.*
Dance *v.* Girdler, 1N.R. 34
Daniel, Scholey *v.* 2B.&P. 540
——, Watt *v.* 1B.&P. 425
Dann *v.* Spurrier, 3B.&P. 399. 442
Danvers, Leader *v.* 1B.&P. 359
———, Stevenson *v.* 2B.&P. 109
Darley, Emden *v.* 1N.R. 22
——, English *v.* 2B.&P. 61
Davenport, Ayrey *v.* 2N.R. 474
———, Davis *v.* 2B.&P. 72
Davis *v.* Chippendale, 2B.&P. 282. 367
——, Da Costa *v.* 1B.&P. 242
—— *v.* Davenport, 2B.&P. 72
—— *v.* Edmonson, 3B.&P. 382
——, Elliot *v.* 2B.&P. 338
——, Feltmakers' Company *v.* 1B.&P. 98
—— *v.* Jones, 1N.R. 267

Davis *v.* Owen, 1B.&P. *page* 342
——, The King *v.* 1B.&P. 336
——, Reynolds *v.* 1B.&P. 625
——, Walsh *v.* 2N.R. 245
Davison *v.* March, 1N.R. 157
Davy, Burnsall *v.* 1B.&P. 215
Decker *v.* Shedden, 3B.&P. 180
——— *v.* Thompson, 3B.&P. 319
Deering (Sir Edw.) *v.* Earl of Winchelsea, 2B.&P. 270
Defflis *v.* Parry, 3B.&P. 3
De Gaillon *v.* L'Aigle, 1B.&P. 8. 357. 368
De La Cour, De Symonds *v.* 2N.R. 374
De La Rue *v.* Stewart, 2N.R. 362
De Lunaville *v.* Phillips, 2N.R. 97
Denn d. Briddon et Ux. v. *Page* 1B.&P. 261. *n.*
—— Mellor *v.* Moore, 1B.&P. 30. 558
———, Moore *v.* 2B.&P. 247
Dent, White *v.* 1B.&P. 341
De Symonds *v.* De La Cour, 2N.R. 374
——— *v.* Johnson, 2N.R. 77
v. Sheddon, 2B.&P. 153
De Vignier v *Swanson*, 1B.&P. 346 *n.*
Deulin, Clark *v.* 3B.&P. 363
Dickenson *v.* Boyne, 1B.&P. 335
———, Smith *v.* 3B.&P. 630
Dicker *v.* Adams, 2B.&P. 163
Dickson, Keene d. Pinnock et Ux. v. 1B.&P. 254. *n.*
Digby, Barrs *v.* 1N.R. 281
Dilnot, Doe d. *v.* Dilnot, 2N.R. 401
Dixon, Blakey *v.* 2B.&P. 321
——— *v.* Dixon, 2B.&P. 443
———, Littledale *v.* 1N.R. 151
Dobson *v.* Sir W. Herne, 1B.&P. 366
Dodd, Burrell *v.* 3B.&P. 378
——, Serres *v.* 2N.R. 405
Doe d. Andrew *v.* Hutton, 3B.&P. 643
Baddam *v.* Roe, 2B.&P. 55
Bailey *v.* Roe, 1B.&P. 369
Doe d. Banks *v.* Booth, 2B.&P. *page* 219
——— Barnfield *v.* Wetton, 2B.&P. 324
——— Bothwell *v.* Martyr, 1N.R. 332
——— Briscoe and Others *v.* Clarke and Wife, 2N.R. 343
——— Cutler's Company *v.* Hogg, 1N.R. 306
——— Dacre *v.* Dacre, 1B.&P. 250. 659
——— Dilnot *v.* Dilnot, 2N.R. 401
——— Lushington *v.* Bishop of Landaff, 2N.R. 491
——— Planner *v.* Scudamore, 2B.&P. 289
——— Potter *v.* Archer, 1B.&P. 531
——— Walker *v.* Stevenson, 3B.&P. 22
——— Wright and Others *v.* Child, 1N.R. 335
Donnelly *v.* Dunn, 1B.&P. 448
——— 2B.&P. 45
——— v. *M'Lagan*, 2B.&P. 45. *n.*
Dorant *v.* Rouvellet, 2N.R. 247
Douglass, Maclean *v.* 3B.&P. 128
Dowland, Slade *v.* 2B.&P. 570
Down, Fowler *v.* 1B.&P. 44
Downshire (Marquis of) Goodright ex dem. The Earl of Buckinghamshire *v.* 2B.&P. 600
Dowse *v.* Reeve, 2B.&P. 578
Drakeford, Hodges 1N.R. 270
Driscol *v.* Bovil, 1B.&P. 313
—— Passmore, 1B.&P. 200
Dubois, Cazalet *v.* 1B.&P. 81
Duchess de Pienne, Burfield *v.* 2N.R. 380
Dudley, Archer v. 1B.&P. 381. *n.*
Duff, Audley *v.* 2B.&P. 111
——, Long *v.* 2B.&P. 209
Duke d. Fitzjames, Melan *v.* 1B.&P. 138
Dumsday *v.* Hughes, 3B.&P. 453
Dunmore, Robinson *v.* 2B.&P. 416
Dunn, Donnelly, *v.* 1B.&P. 448

Dunn, Donnelly *v.* 2B.&P. *page* 45
Durham (Bishop of), Jefferson *v.* 1B.&P. 105
Dutton *v.* Solomonson, 3B.&P. 582
Dyer *v.* Bullock, 1B.&P. 344
Dyson *v.* Birch, 1B.&P. 4
—— *v.* Rowcroft, 3B.&P. 474

E.

Eagleton *v.* The East India Company, 3B.&P. 55
Eamer (Sir J.), Page *v.* 1B.&P. 378
Eardley *v.* Price, 2N.R. 333
East India Company, Eagleton *v.* 3B.&P. 55
Eccles, Hawkins *v.* 2B.&P. 359
Eden, Maddox *v.* 1B.&P. 480
Roberts *v.* 1B.&P. 398
Edgar, Bowring *v.* 1B.&P. 270
Edmonson, Davis *v.* 3B.&P. 382
——, Menham *v.* 1B.&P. 369
—— *v.* Parker, 3B.&P. 185
—— *v.* Popkin, 1B.&P. 270
Edwards, Cowell *v.* 2B.&P. 268
——, Elliot *v.* 3B.&P. 181
Eggington, The King *v.* 2B.&P. 508
Eland, Chapman *v.* 2N.R. 82
Elliot *v.* Davis, 2B.&P. 338
—— *v.* Edwards, 3B.&P. 181
——. *The King* v. 2N.R. 93. *n.*
——, Tenant *v.* 1B.&P. 3
Ellis, Ablet *v.* 1B.&P. 249
—— *v.* Govey, 1B.&P. 469
—— *v.* Mortimer, 1N.R. 257
Emden *v.* Darley, 1N.R. 22
Emmett *v.* Lyne, 1N.R. 255
England *v.* Kerwan, 1B.&P. 335
English Darley, 2B.&P. 61
Escott v. *Smedley*, 1B.&P. 319. *n.*
Evans Evan, *Ex parte*, 2B.&P. 88
—— *v.* Gill, 1B.&P. 52
—— *v.* Surman, 1N.R. 63
—— *v.* Weaver, 1B.&P. 20
Everard v. *Hollingworth*, 2B.&P. *page* 111. *in notis.*
Everett, Shaw *v.* 1B.&P. 222
Eyles, Griffiths *v.* 1B.&P. 413
——, Turner *v.* 3B.&P. 456

F.

Fail *v.* Pickford, 2B.&P. 234
Fairbain, Scheibel *v.* 1B.&P. 388
Fairfield ex d. Hawkesworth *v.* Morgan, 2N.R. 38
Farmer *v.* Russel, 1B.&P. 296
Farrer *v.* The Countess of Granard, 1N.R. 80
Farrington, Shum *v.* 1B.&P. 640
Faulkner *v.* Wise, 2B.&P. 150
Favine, Aylwin *v.* 2N.R. 430
Fawcett *v.* Christie, 2B.&P. 515
Fazan, Norton *v.* 1B.&P. 226
Federici, Stacey *v.* 2B.&P. 390
Feise *v.* Linder, 3B.&P. 372
Feltmakers' Company *v.* Davis, 1B.&P. 98
Fenn d. Blanchard *v.* Wood, 1B.&P. 573
—— Buckle *v.* Roe, 1N.R. 293
Fenton *v.* Boyle, 2N.R. 399
—— *v.* Ruggles, 1B.&P. 356
Fenwick, *Taylor* v. 3B.&P. 555. *n.*
Ferrars, Roe d. Pallatt *v.* 2B.&P. 512
Field *v.* Serres, 1N.R. 121
—— *v.* Wainewright, 3B.&P. 39
Finck, Chatterley *v.* 3B.&P. 390
——, Hollings *v.* 2B.&P. *ib.*
Fish, Longchamp d. Goodfellow *v.* 2N.R. 415
Fisher *v.* M'Namar 1B.&P. 292
——, Wye *v.* 3B.&P. 443
Fletcher *v.* Braddic 2N.R. 182
Flint *v.* Brandon, 1N.R. 75
Flower, Allingham 2B.&P. 246
Folliott, *Wood and Others* v. 3B.&P. 552. *n.*
Foott *v.* Coare. 2B.&P. 588
Forbes *v.* Phillips, 2N.R. 98
Forsyth *v.* Marriott, 1N.R. 251

Fowler *v.* Down, 1B.&P. *page* 44
———, Knight *v.* 2N.R. 67
———*v.* Morton, 2B.&P. 48
Fox, Milliken *v.* 1B.&P. 157
—— *v.* Money, 1B.&P. 250
Frame, Parry *v.* 2B.&P. 451
Francis, Bennett *v.* 2B.&P. 550
Francisco *v.* Gilmore, 1B.&P. 177
Freelove, Burgess *v.* 2B.&P. 425
Freeman *v.* Jackson, 1B.&P. 479
———, Scurry *v.* 2B.&P. 381
French, Hague *v.* 3B.&P. 173
Frontine *v.* Frost, 3B.&P. 302
Frost, Frontine *v.* *ib.* *ib.*
Fry, Page *v.* 2B.&P. 240
Fulham *v.* Bagshaw, 1B.&P. 292
Fuller, The King *v.* 1B.&P. 180.
Fullerton, Powell *v.* 2B.&P. 420
Fulwood *v.* Annis, 3B.&P. 321
Furtado *v.* Rodgers, 3B.&P. 191

G.

Galton *v.* Harvey, 1B.&P. 192
Gandy *v.* Borrowdale, 1N.R. 273
Gardner *v.* Baillie, 1B.&P. 32
Garland *v.* Thomas, 1N.R. 82
Garment, Melton *v.* 2N.R. 84
Garnham *v.* Hammond, 2B.&P. 298
Gerrard, Clifton *v.* 1B.&P. 524. 659
——— *v.* Cooke, 2N.R. 109
Gibson *v.* Chaters, 2B.&P. 129
——— *v.* Wells, 1N.R. 290
Giddins, Roberts *v.* 1B.&P. 337
Gilbert, Wilson *q. t. v.* 2B.&P. 281
Gildart, Tesseyman *v.* 1N.R. 292
Gill, Evans *v.* 1B.&P. 52
—— v. *Parsons*, 1B.&P. 572. *n.*
Gilmore, Francisco *v.* 1B.&P. 177
Gilson, Bell *v.* 1B.&P. 345
Girdler, Dance *v.* 1N.R. 34
Glover, King *v.* 2N.R. 206
———, Willes *v.* 1N.R. 14
Goddard, Smith *v.* 3B.&P. 465
Goddard v. *Vanderheyden*, 2B.&P. *page* 8. *n.*
Godwin, Scott *v.* 1B.&P. 67
Goggerley *v.* Cuthbert, 2N.R. 170
Goldsmid *v.* Taite, 2B.&P. 55
Goodfellow, Langchamp ex d. *v.* Fish, 2N.R. 415
Goodill *v.* Brigham, 1B.&P. 192
Goodright ex dem. Earl of Buckinghamshire *v.* The Marquis of Downshire, 2B.&P. 600
Goodtitle ex dem. Castle and Another *v.* White, 2N.R. 383
———— Read *v.* Badtitle, 1B.&P. 384
———— Roberts *v.* Badtitle, 1B.&P. 385
———— Holford *v.* Otway, 1B.&P. 576. 659
———— Wanklin *v.* Badtitle, 2B.&P. 120
Goodwin, Pierson *v.* 1B.&P. 361
Goring (Sir H.) *v.* Welles, 1B.&P. 395
Goss, Richardson *v.* 3B.&P. 119
Gosling, Barnard *v.* 1N.R. 245
Gough, Osborne *v.* 3B.&P. 551
Govett *v.* Johnson, 2B.&P. 465
Govey, Ellis *v.* 1B.&P. 469
Grace *Ex parte*, 1B.&P. 376
Graham, Mills *v.* 1N.R. 140
Granard (Countess of), Farrer *v.* 1N.R. 80
Granger, Hopley *v.* 1N.R. 256
Grant v. *Parkinson*, 3B.&P. 85 *n.*
———, Stevenson *v.* 2N.R. 103
Gravall *v.* Stimpson, 1B.&P. 478
Gray *v.* Pindar, 2B.&P. 427
—— *v.* Sidneff, 3B.&P. 395
Green, Pilkington *v.* 2B.&P. 151
—— *v.* Redshaw, 1B.&P. 227
Greensill *v.* Hopley, 1B.&P. 103
Greenslade *v.* Rotheroe, 2N.R. 132
Griffiths *v.* Eyles, 1B.&P. 413
——— *Matthews* (q. t.) 1B.&P. 153. *n.*

Grigby *v.* Oakes, 2B.&P. *page* 526
Grimes *v.* Naish, 1B.&P. 480
Grindley *v.* Barker, 1B.&P. 229
Groote, Tattersall *v.* 2B.&P. 131. 253
Grundy *v.* Mell, 1N.R. 28
Guy, Coker *v.* 2B.&P. 565
Gwillim *v.* Holbrook, 1B.&P. 410

H.

Hadkinson *v.* Robinson, 3B.&P. 388
Hague *v.* French, 3B.&P. 173
Hailie *v.* Smith, 1B.&P. 563
Halford, Hill *v.* 2B.&P. 413
Hall, Maria *v.* 2B.&P. 236
——— *v.* Oddy, 2B.&P. 28
Hallewell *v.* Trapps, 2N.R. 173
Halsey, Knight *v.* 2B.&P. 172
Hamar *v.* Alexander 2N.R. 241
Hamilton, Wilton *v.* 1B.&P. 445
Hammersley *v.* Mitchell, 2B.&P. 389
Hammett (Sir B.) *v.* Sir W. Yea, 1B.&P. 144
Hammond *v.* Anderson, 1N.R. 69
———, Garnham *v.* 2B.&P. 298
Handcock *v.* Baker, 2B.&P. 260
Hankin *v.* Broomhead, 3B.&P. 607
Hannay, Taynton *v.* 3B.&P. 26
Hanning, Trent *v.* 1N.R. 116
Hantler, Bailey *v.* 2B.&P. 126
Hardcastle, Comber *v.* 3B.&P. 115
Harding *v.* Hennem, 3B.&P. 232
Hardisty *v.* Storer, 1N.R. 123
Hare, Taylor *v.* 1N.R. 260
Harper *v.* M'Carthy, 2N.R. 258
Harris *v.* Manley, 2B.&P. 526
———, Taylor *v.* 3B.&P. 549
———, Ward *v.* 2B.&P. 265
———, Wilson *v.* 2B.&P. 320
Harrison, Batten *v.* 3B.&P. 1
———, Blyth *v.* 1B.&P. 535
Sykes *v.* 1B.&P. 29
Harrow School *v.* Alderton, 2B.&P. 86
Hart, Adderley v. 1B.&P. 394 *in notis.*
Hart, Watts *v.* 1B.&P. *page* 134
Hartshorn, Muller *v.* 3B.&P. 556
——— *v.* Slodden, 2B.&P. 582
Harvey, Galton *v.* 1B.&P. 192
Harwood *v.* Sir J. Astley, 1N.R. 47
——— *v.* Lester, 3B.&P. 617
Haskins *v.* Morris, 1B.&P. 92
Hawkins *v.* Eccles, 2B.&P. 359
———, Turner *v.* 1B.&P. 472
Hawkesworth, Fairfield ex d. *v.* Morgan, 2N.R. 38
Hay *v.* Howell, 2N.R. 397
Haynes *v*, Birks, 3B.&P. 599
Head, Mills *v.* 1N.R. 137
Heale and Others, Hill (Assignee of Wight) *v.* 2N.R. 196
Heath *v.* Rose, 2N.R. 223
Hector, M'Connell *v.* 2B.&P. 549
——— 3B.&P. 113
Heddon, Whitelock *v.* 1B.&P. 243
Heel, Holcroft *v.* 1B.&P. 400
Helling, Roe d. *v.* Yeud, 2N.R. 214
Henderson, Lothian *v.* 3B.&P. 499
Hennem, Harding *v.* 3B.&P. 232
Henshaw *v.* Rutley, 1N.R. 110
Herbert and Another *v.* Boulcot, 3B.&P. 235
Herbst, Soilleux *v.* 2B.&P. 444
Herne (Sir W.) Dobson *v.* 1B.&P. 366
———, Webb *v.* 1B.&P. 281
Herries, Pollard *v.* 3B.&P. 335
Heseltine, Wheeler *v.* 2B.&P. 560
Hesketh, Hutchins *v.* 1B.&P. 143
Hesse *v* Stevenson, 3B.&P. 565
———, 1N.R. 133
Hicks *v.* Richardson, 1B.&P. 93
Hifferman *v.* Langelle, 2B.&P. 363
Higginson *v.* Nesbitt, 1B.&P. 97
Hill, Ames *v.* 2B.&P. 150
Hill Ex parte, 2N.R. 191. *n.*
——— *v.* Halford, 2B.&P. 413
——— (Assignee of White) *v.* Heale, 2N.R. 196
——— *v.* Humphreys, 2B.&P. 343
——— *v.* Reeves, 1B.&P. 424

Hill *v.* Secretan, 1B.&P. *page* 315
—— *v.* Tebb, 1N.R. 298. 311
Hitchener, Borrowdale *v.* 3B.&P. 244
Hodges *v.* Drakeford, 1N.R. 270
———, Meredith *v.* 2N.R. 453
Hodgkinson *v.* Snibson, 3B.&P. 603
Hodgson *v.* Malcolm, 2N.R. 336
——— *v.* Rickard and Others, 2N.R. 389
Hogan *v.* Page, 1B.&P. 337
Hogg, Doe d. the Cutlers' Company *v.* 1N.R. 306
Holben, Cawthorne *v.* 1N.R. 279
Holbrook, *Beddome* v. 1B.&P. 450. *n.*
— ———, Gwillim *v.* 1B.&P. 410
Holcroft *v.* Heel, 1B.&P. 400
Holditch, Crooks *v.* 1B.&P. 176
Holford *v.* Copeland, 3B.&P. 129
———, Goodtitle ex d. *v.* Otway, 1B.&P. 576. 659
Holin *v.* Bargus, 2B.&P. 42
Holland *v.* Hopkins, 2B.&P. 243
——— *v.* Palmer, 1B.&P. 95
——— *v.* White, 2B.&P. 341
Hollings *v.* Finck, 2B.&P. 390
Hollingworth, *Everard* v. 2B.&P. 111. *in notis.*
Hollis *v.* Brandon, 1B.&P. 36
Holmes, Maddocks *v.* 1B.&P. 228
——— *v.* Rhodes, 1B.&P. 638
——— v. *Wennington*, 2B.&P. 399. *n.*
Holsten *v.* Culliford, 1B.&P. 214
Holward *v.* Andrè, 1B.&P. 32
Honor, Purton *v.* 1B.&P. 205
Hope *v.* Bennett, 2N.R. 397
Hopgood *v.* Wright and Others, 2N.R. 188
Hopkins, Holland *v.* 2B.&P. 243
Shrole, 1B.&P. 382
Hopley *v.* Granger, 1N.R. 256
———, Greensill *v.* 1B.&P. 103
Hopper, Moores *v.* 2N.R. 411
Horlock, Parkinson *v.* 2N.R. 240
Horncastle, Wolf *v.* 1B.&P. 316
Horton, Mountford *v.* 2N.R. 62
Hosier *v.* Lord Arundell, 3B.&P. *page* 7
—— *v.* Searle, 2B.&P. 299
Hoste, Cator *v.* 2B.&P. 557
Houghton *v.* Matthews, 3B.&P. 485
Howell *v.* Coleman, 2B.&P. 466
———, Hay *v.* 2N.R. 397
Hubbard *Ex parte*, 1B.&P. 423
———, Touteng *v.* 3B.&P. 291
Hubbart, Murray *v.* 1B.&P. 645
Huggett *v.* Montgomery, 2N.R. 446
Hughes, Dumsday *v.* 3B.&P. 453
Huish, Inman *v.* 2N.R. 133
Humphreys, Hill *v.* 2B.&P. 343
Huntley *v.* Luscombe, 2B.&P. 530
Hurry *v.* The Royal Exchange, 2B.&P. 430
—— 3B.&P. 308
Huskinson, Kent *v.* 3B.&P. 233
Hutchin *v.* Hesketh, 1B.&P. 143
Hutchinson, March *v.* 2B.&P. 226
Hutton, Doe d. Andrew *v.* 3B.&P. 643

I.

Iffgrave, Sharpe *v.* 3B.&P. 394
Iggulden *v.* May, 2N.R. 449
Iles *v.* Roxall, 2B.&P. 89
Imbleton, Rogers *v.* 2N.R. 117
Inman *v.* Huish, 2N.R. 133
Isaacs, Van Braam *v.* 1B.&P. 451
Izard, Stead *v.* 1N.R. 312

J.

Jackson, Freeman *v.* 1B.&P. 479
———, Saunderson *v.* 2B.&P. 238
Jacobs, Collins *v.* 3B.&P. 579
——— *v.* Stevenson, 1B.&P. 96
Jakes, Burbige *v.* 1B.&P. 225
Jarrett, Bucher *v.* 3B.&P. 143
——— *v.* Creasy, 3B.&P. 603
Jeffries *v.* Watts, 1N.R. 153
Jefferson *v.* Bishop of Durham, 1B.&P. 105

Jelfs *v.* Ballard, 1B.&P. *page* 467
Jenkins *v.* Law, 1B.&P. 365
———, Rogers *v.* 1B.&P. 383
Jennings *v.* Vernon, 3B.&P. 361
Jenny d. Preston *v.* Cutts, 1N.R. 308
Jeys *v.* Booth, 1B.&P. 97
Jeykel *v.* Sir J. Moore, 2N.R. 341
Johannott, Sir W. Stains *v.* 1B.&P. 200
Johnson v. *Broderick*, 3B.&P. 406. *n.*
———, Dahl *v.* 1B.&P. 205
———, De Symonds *v.* 2N.R. 77
———, Govett *v.* 2B.&P. 465
——— *v.* Johnson, 3B.&P. 162
———, Lloyd *v.* 1B.&P. 340
———, Tipping *v.* 2B.&P. 302. 357
Johnstone, Sabine *v.* 1B.&P. 60
Joliffe, *Milbank* v. 2B.&P. 580. *n.*
Jolliffe *v.* Morris, 1B.&P. 38
Jones *v.* Armytage, 2B.&P. 38
——— *v.* Chune, 1B.&P. 363
——— *v.* Clay, 1B.&P. 191
——— Davis *v.* 1N.R. 267
Kitchen, 1B.&P. 76
——— Phillips *v.* 3B.&P. 362
Jordan, Thompson *v.* 2B.&P. 137
Jory *v.* Orchard, 2B.&P. 39
Joseph *v.* Orme, 2N.R. 180
Judin *v.* Samuel, 1N.R. 43
Judine *v.* Da Cossen 1N.R. 234
Jukes and Another, Maidment *v.* 2N.R. 429

K.

Keate *v.* Temple, 1B.&P. 158
Keay *v.* Rigg, 1B.&P. 11
Keene ex dim. Pinnock et Ux. v. *Dickson*, 1B.&P. 254. *n.*
Kell, M'Master *v.* 1B.&P. 302
Kenman *v.* Bean, 2N.R. 433
Kennedy, Martin *v.* 2B.&P. 69
Kenrick *v.* Lord W. Beauclerck, 3B.&P. 175
Kent *v.* Huskinson, 3B.&P. 233
Kent, Myers *v.* 2N.R. *page* 463
Kenworthy, *Barnard* v. 1B.&P. 73. *n.*
Keppel, Bicknell *v.* 1N.R. 20
Kerr, Adam *v.* 1B.&P. 360
v. Sheriff, 2B.&P. 358
Kerwan, England *v.* 1B.&P. 335
Kewley, Brown *v.* 2B.&P. 518
Kidd *v.* Rawlinson, 2B.&P. 59
Killingbeck, Poulter *v.* 1B.&P. 397
King *v.* Glover, 2N.R. 206
King (The) *v.* Aslet 1N.R. 1
——— *v.* Brady, 1B.&P. 187
——— *v.* Croker, 2N.R. 87
——— Cumberland, Inhabitants of, *v.* 3B.&P. 354
——— *v.* Davis, 1B.&P. 336
——— *v.* Egginton, 2B.&P. 508
——— v. *Elliott*, 2N R. 93. *n.*
——— *v.* Fuller, 1B.&P. 180
——— *v.* M'Gregor, 3B.&P. 106
——— *v.* Palmer and Hudson, 1N.R. 96
——— *v.* Perring, 3B.&P. 151
——— *v.* Pooley, 3B.&P. 311
——— *v.* Smith, 2B.&P. 127
——— *v.* Taylor, 3B.&P. 596
——— *v.* Wylie, 1N.R. 92
Kincard, Wiffin *v.* 2N.R. 471
Kirby *v.* Sadgrove, 1B.&P. 13
Kitchen, Jones *v.* 1B.&P. 76
Kitchin *v.* Blanchard, 1B.&P. 378
———, Cox *v.* 1B.&P. 338
Knee *Ex parte*, 1N.R. 148
Knight *v.* Fowler, 2N.R. 67
——— *v.* Halsey, 2B.&P. 172
———, Orton *v.* 3B.&P. 153
Knowles *v.* Reading, 1B.&P. 311
Knox, Clempson *v.* 2B.&P. 516
Koops, Chapman *v.* 3B.&P. 289

L.

Lacy, Rodgers *v.* 2B.&P. 57
Laidlaw *v.* Sir J. Cockburn, 2N.R. 76

L'Aigle, De Gaillon *v.* 1B.&P. *page* 8. 357. 368
Laing *v.* Raine, 2B.&P. 85
Lake *v.* Smith, 1N.R. 174
Lambert, North *v.* 2B.&P. 218
Landaff (Bishop of) Doe d. Lushington *v.* 2N.R. 491
Langs, Salkeld *v.* 2B.&P. 416
Lang *v.* Woodhouse, 1B.&P. 31
Langdale, Morris *v.* 2B.&P. 284
Langelle, Hifferman *v.* 3B.&P. 363
Langloie v. *Brant*, 2B.&P. 433. cit. *in notis.*
Langmead, Waghorne *v.* 1B.&P. 571
Larkins *v.* Larkins, 3B.&P. 16. 109.
Law, Jenkins *v.* 1B.&P. 365
Lawley (Lady), Thompson *v.* 2B.&P. 303
Lawrence *Ex parte*, 1B.&P. 477.
Lawson *v.* M'Donald, 2B.&P. 590
Layton, Powell *v.* 2N.R. 365
Leader *v.* Danvers, 1B.&P. 359
Leatham *v.* Terry, 3B.&P. 479
Leechmere *v.* Rice, 2B.&P. 12
Lee, Pensons *v.* 2B.&P. 330
Siffkin *v.* 2N.R. 484
—, Trapp *v.* 3B.&P. 367
Leeds *v.* Wright, 3B.&P. 320
Lees *v.* Warlters, 2B.&P. 465
Legh *v.* Legh, 1B.&P. 447
——, Lewis *v.* 3B.&P. 231
Le Grew *v.* Cooke, 1B.&P. 332
Le Mesurier, Arrowsmith *v.* 2N.R. 211
Leominster Canal Company *v.* Cowell, 1B.&P. 213
Lester, Harwood *v.* 3B.&P. 617
Lewis *v.* Legh, 3B.&P. 231
Lightfoot *v.* Tenant, 1B.&P. 551
Linder, Feise *v.* 3B.&P. 372
Lindo, Atty *v.* 1N.R. 236
Lingham *v.* Biggs, 1B.&P. 82
Lister *v.* Mundell, 1B.&P. 427
Litchfield (Bishop of), Birch *v.* 3B.&P. 444
Littledale *v.* Dixon, 1N.R. *page* 151
Liverpool Corporation, *London Corporation* v. 1B.&P. 522 *n.*
Lloyd *v.* Johnson, 1B.&P. 340
London Assurance Company, *Rucker* v. 2B.&P. 432 *n.*
London Corporation v. *Liverpool Corporation*, 1B.&P. 522. *n.*
—— *v.* Lynn Corporation, 1B.&P. 487
Long *v.* Bolton, 2B.&P. 209
——, Curling *v.* 1B.&P. 634
—— *v.* Duff, 2B.&P. 209
Longchamp d. Goodfellow *v.* Fish, 2N.R. 415
Longman *v.* Tripp, 2N.R. 67
Losemore *v.* Cohen, 1N.R. 279
Lothian *v.* Henderson, 3B.&P. 499
Lotuisa Margaretha, 1B.&P. 349. *n.*
Loveday, Badley *v.* 1B.&P. 81
Loveland, Cook *v.* 2B.&P. 31
Loveridge *v.* Botham, 1B.&P. 49
Lovibond *v.* Moreshed, 2N.R. 57
Lucena *v.* Crawfurd, 3B.&P. 75
——, 2N.R. 269
Ludlow, Cooke *v.* 2N.R. 119
Luffkin *v.* Nunn, 1N.R. 163
Luscombe, Huntley *v.* 2B.&P. 530
Lushington, Doe d. *v.* Bishop of Landaff, 2N.R. 491
Luytjes, Pieters *v.* 1B.&P. 1
Lyne, Emmett *v.* 1N.R. 255
Lynn Corporation, London Corporation *v.* 1B.&P. 487

M.

Macdonald *v.* Pasley, 1B.&P. 161
Macdonnell *v.* Macdonnell, 3B.&P. 174
Mackenzie, Cunningham *v.* 2B.&P. 598
Mackreth, Askew *v.* 1N.R. 214
Maclean *v.* Douglass, 3B &P. 128
Madan, Tagg *v.* 1B.&P. 629
Maddocks *v.* Bulcock, 1B.&P. 325

Maddocks *v.* Holmes, 1B.&P. *page* 228
Maddox *v.* Eden, 1B.&P. 480
Madox v. *Abercromby*, 2B.&P. 389 *n.*
Maidment *v.* Jukes and Another, 2N.R. 429
Mainwaring *v.* Newman, 2B.&P. 120
Makilwaine, Margerem *v.* 2N.R. 509
Malcolm, Hodgson *v.* 2N.R. 336
Manly, Harris *v.* 2B.&P. 526
Mann *v.* Sheriff, 2B.&P. 355
Manners (*q. t.*) *v.* Postan, 3B.&P. 343
Manning, Baylis *v.* 1N.R 233
March, Davison *v.* 1N.R. 157
Marchington v. *Vernon*, 1B.&P. 101. *n.*
Marden, Anstey *v.* 1N.R. 124
Margerem *v.* Makilwaine, 2N.R. 509
Maria *v.* Hall, 2B.&P. 236
Marnell, Carpenter *v.* 3B.&P. 40
———, Chetwind *v.* 1B.&P. 271
Marriott, Forsyth *v.* 1N.R. 251
Marryat *v.* Wilson, 1B.&P. 430
Marsh *v.* Hutchinson, 2B.&P. 226
—— (Sir C.) *v.* Martindale, 3B.&P. 154
Marshall *v.* Birkenshaw, 1N.R. 172
Martin, Broughton *v.* 1B.&P. 176
———, Collins *v.* 1B.&P. 648
——— *v.* Kennedy, 2B.&P. 69
——— *v.* Pitcher, 3B.&P. 171
——— *v.* Slade, 2N.R. 59
Martindale, Marsh (Sir C.) *v.* 3B.&P. 154
Martyr, Doe d. Bothell *v.* 1N.R. 332
Matthew, Webb *v.* 1B.&P. 225
Matthews (q. t.) v. *Griffiths*, 1B.&P. 153 *n.*
Matthews, Houghton *v.* 3B.&P. 485
Matthie *v.* Potts, 3B.&P. 23
Maunder, Melhuish *v.* 2N.R. 72
Mawson, Stock *v.* 1B.&P. 286
Max *v.* Roberts, 2N.R. 454
May, Anderson *v.* 2B.&P. *page* 237
——, Iggulden *v.* 2N.R. 449
——, Tippet *v.* 1B.&P. 411
——, Whitbread *v.* 2B.&P. 593
Maycock *v.* Solyman, 1N.R. 139
Mayor and Burgesses of Stafford *v.* Boulton, 1B.&P. 40
Maze, Aubert *v.* 2B.&P. 371
M'Carthy, Harper *v.* 2N.R. 258
M'Collam *v.* Carr, 1B.&P. 223
M'Connell *v.* Hector, 2B.&P. 549
———————, 3B.&P. 113
M'Cullock *v.* Robinson, 2N.R. 352
M'Donald, Lawson *v.* 2B.&P. 590
Meagher *v.* Vandyke, 2B.&P. 370
Mears, Parke *v.* 2B.&P. 217
Meddowscroft *v.* Sutton, 1B.&P. 61
Meeke *v.* Oxlade, 1N.R. 289
M'Lagan, Donnelly v. 2B.&P. 45 *n.*
Melan *v.* Duke de Fitzjames, 1B.&P. 138
Melhuish *v.* Maunder, 2N.R. 72
Mell, Grundy *v.* 1N.R. 28
Mellor, Denn d. *v.* Moore, 1B.&P. 30. 558
——— Denn d. Moore *v.* 2B.&P. 247
Melton *v.* Garment, 2N.R. 84
Menham *v.* Edmonson, 1B.&P. 369
Meredith *v.* Hodges, 2N.R. 453
Merredew, Thornton *v.* 3B.&P. 362
Messenger, Price *v.* 2B.&P. 158
Metcalf, Anthill *q. t. v.* 2N.R. 169
——— and Another *v.* Scholey and Another, 2N.R. 461
M'Gregor, The King *v.* 3B.&P. 106
Millbank v. *Joliffe*, 2B.&P. 580 *n.*
Miller *v.* Bolt, 2B.&P. 420
—— *v.* Cousins, 2B.&P. 329
Milliken *v.* Fox, 1B.&P. 157
Mills *v.* Ball, 2B.&P. 457
—— *v.* Graham, 1N.R. 140
—— *v.* Head, 1N.R. 137
Mitchell, Hammersley *v.* 2B.&P. 389
M'Lacklan, Templer *v.* 2N.R. 136

M'Master *v.* Kell, 1B.&P. *page* 302
M'Namara, Fisher *v.* 1B.&P. 292
Moffat *v.* Carter, 2N.R. 75
——— v. *Van Millingen*, 2B.&P. 124. *n.*
Money, Fox *v.* 1B.&P. 250
Monsieur de France, Sinclair *v.* 2B.&P. 363
Montgomery, Huggitt *v.* 2N.R. 446
Moody *v.* Pheasant, 2B.&P. 446
Moore (Sir J.) Jeykel *v.* 2N.R. 341
———, Denn. d. Mellor, *v.* 1B.&P. 30. 558
——— *v.* Denn. d. Mellor, 2B.&P. 247
Moores *v.* Hopper, 2N.R. 411
Morck *v.* Abel, 3B.&P. 35
Moreshed, Lovibond *v.* 2N.R. 57
Morgan, Charlwood *v.* 1N.R. 64
———, Cox *v.* 2B.&P. 398
———, Fairfield ex d. Hawksworth *v.* 2N.R. 88
Sargent, 1B.&P. 58
Morley *v.* Strombom, 3B.&P. 254
Morris, Haskins *v.* 1B.&P. 92
———, Joliffe *v.* 1B.&P. 38
——— *v.* Langdale, 2B.&P. 284
——— *v.* Wall, 1B.&P. 208
Mortimer, Ellis *v.* 1N.R. 257
Morton, Fowler *v.* 2B.&P. 48
Motley et Ux. *Ex parte*, 2B.&P. 455
Mountford *v.* Horton, 2N.R. 62
——— *v.* Willes, 2B.&P. 337
Muller *v.* Hartshorn, 3B.&P. 556
Mundell, Lister *v.* 1B.&P. 427
Munstone, Cooke *v.* 1N.R. 351
Murphy *v.* Cadell, 2B.&P. 137
Murray *v.* Hubbart, 1B.&P. 645
M'Vicar, Sellar *v.* 1N.R. 23
Myers *v.* Kent, 2N.R. 463

N.

Naish, Grimes *v.* 1B.&P. 480
Natally, Strong *v.* 1N.R. 16
Nation *v.* Barrett, 2B.&P. *page* 30
Neat *v.* Allen, 1B.&P. 21
Neave *v.* Pratt, 2N.R. 408
Nelson (Lord) *v.* Tucker, 3B.&P. 257
Nesbitt, Higginson *v.* 1B.&P. 97
Newman, *v.* Anderton 2N.R. 224
———, Mainwaring *v.* 2B.&P. 120
——— *v.* Walters, 3B.&P. 612
Newton, Atkinson *v.* 2B.&P. 336
——— *v.* Young, 1N.R. 187
Noah, Anderson *v.* 1B.&P. 31
North *v.* Lambert, 2B.&P. 218
——— (q. t.) *v.* Smart, 1B.&P. 51
Northwick (Lord) *v.* Stanway, 3B.&P. 346
Norton *v.* Fazan, 1B.&P. 226
Norville *v.* St. Barbe, 2N.R. 434
Nunn, Luffkin *v.* 1N.R. 163
Nurse *v.* Craig, 2N.R. 148
Nurton, Buck d. Whalley *v.* 1B.&P. 53

O.

Oakes, Grigby *v.* 2B.&P. 526
Ody, Hall *v.* 2B.&P. 28
O'Kelly, Smith *v.* 1B.&P. 75
———, Sparkes *v.* 2N.R. 421
Oliver, Waddington *v.* 2N.R. 61
Onslow *v.* Smith, 2B.&P. 384
Oppenheim *v.* Russell, 3B.&P. 42
Orchard, Jory *v.* 2B.&P. 39
Orme, Joseph *v.* 2N.R. 180
Orr, Bagott *v.* 2B.&P. 472
Orton *v.* Knight, 3B.&P. 153
Osborn *v.* Gough, 3B.&P. 551
——— *v.* Tatum, 1B.&P. 271
Otway, Goodtitle ex dim. Holford *v.* 1B.&P. 576. 659
Owen *v.* Barrow, 1N.R. 101
———, Davis *v.* 1B.&P. 342
——— *v.* Warburton, 1N.R. 326
Oxlade, Meeke *v.* 1N.R. 289

P.

Page, Blight v. 3B.&P. *page* 295. *n.*
——, *Denn ex dim. Briddon et Ux* v. 1B.&P. 261. *n.*
——, *v.* Sir J. Eamer, 1B.&P. 378
—— *v.* Fry, 2B.&P. 240
——, Hogan *v.* 1B.&P. 557
Pajot, Whaley *v.* 2B.&P. 51
Palmer, Holland *v.* 1B.&P. 95
—— and Hudson, The King *v.* 1N.R. 96
Pariente *v.* Castle, 2B.&P. 163
—— *v.* Plumbtree, 2B.&P. 35
Parish, Atty *v.* 1N.R. 104
Parke *v.* Mears, 2B.&P. 217
Parker *v.* Baylis, 2B.&P. 73
——, Edmonson *v.* 3B.&P. 185
—— *v.* Pistor, 3B.&P. 288
—— *v.* Vaughan, 2B.&P. 29
Parkes, Brigden *v.* 2B.&P. 424
Parkhurst, Abercrombie *v.* 2B.&P. 480
Parkin *v.* Radcliffe, 1B.&P. 282. 393
Parkinson, Grant v. 3B.&P. 85. *n.*
—— *v.* Horlock, 2N.R. 240
Parry, Defflis *v.* 3B.&P. 3
—— *v.* Frame, 2B.&P. 451
Parsons, Gill v. 1B.&P. 572. *n.*
—— *v.* Solomon, 1N.R. 111
Partington *v.* Williams, 2N.R. 398
Partridge, Chapman *v.* 2N.R. 382
—— *v.* Sowerby, 3B.&P. 172
Pasley, Macdonald *v.* 1B.&P. 161
Passmore, Driscoll *v.* 1B.&P. 200
Payne *v.* Whaley, 2B.&P. 157
Pead, Cross *v.* 1B.&P. 157
Pearce, Andrew *v.* 1N.R. 158
Pearse *v.* Porklington, 2N.R 58
Peel *v.* Tatlock, 1B.&P. 419
Peters *v.* Throgmorton, 1B.&P. 587
Pell *v.* Brown, 1B.&P. 369
Pellatt, Roe d. *v.* Ferrars, 2B.&P. 542
Pendrill, Willis *v.* 2N.R. 167
Penfold *v.* Westcote, 2N.R. 335
Penner, Talmash *v.* 3B.&P. 12
Penson *v.* Lee, 2B.&P. *page* 330
Perchard v. *Whitmore*, 2B.&P. 155. *n.*
Percy *v.* Powell, 3B.&P. 6
Perkins *v.* Pettitt, 2B.&P. 275. 440
Perring, The King *v.* 3B.&P. 151
——, Stovin *v.* 2B.&P. 561
Perry, Banning *v.* 2B.&P. 69
——, Rawlins *v.* 1N.R. 307
——, Stanway q. t. *v.* 2B&P. 157
Petre (Lord) *v.* Lord Auckland, 2B.&P. 159
Pettit, Scott *v.* 3B.&P. 469
Pettitt, Perkins *v.* 2B.&P. 275. 440
Pheasant, Moody *v.* 2B.&P. 446
Phelps, Balch *v.* 3B.&P. 366
Phillips, Craufurd *v.* 2N.R. 141
——, De Lunaville *v.* 2N.R. 97
——, Forbes *v.* 2N.R. 98
—— *v.* Jones, 3B.&P. 362
Pickford, Aspinall v. 3B.&P4. 4 *n.*
——, Fail *v.* 2B.&P. 234
Pierson, Almgill *v.* 1B.&P. 103
—— *v.* Goodwin, 1B.&P. 361
Pieters *v.* Luytjes, 1B.&P. 1
Pigott *v.* Thompson, 3P.&P. 147
—— *v.* Truste, 3B.&P. 221
Pilkington *v.* Green, 2B.&P. 151
Pillop *v.* Sexton, 3B.&P. 550
Pindar, Gray *v.* 2B.&P. 427
Pinero *v.* Wright, 2B.&P. 235
Pinnock et Ux. (*Keene ex dim.*) v. *Dickson*, 1B.&P. 254. *n.*
Pistor, Parker *v.* 3B.&P. 288
Pitcher, Anderson *v.* 2B.&P. 164
—— *v.* Martin, 3B.&P. 171
Pittman, Saunders *v.* 1B.&P. 33
Place, Wilton *v.* 2B.&P. 56
Planner, Doe d. *v.* Scudamore, 2B.&P. 289
Plummer, Champion *v.* 1N.R. 252
Plumbtree, Pariente *v.* 2B.&P. 35
Pollard *v.* Herries, 3B.&P. 335
Poole *v.* Poole, 3B.&P. 620
Pooley, The King *v.* 3B.&P. 311
Popkin, Edmonson *v.* 1B.&P. 270
Porklington, Pearse *v.* 2N.R. 58

Portall and Others, Turner *v.* 2N.R. *page* 231
Porter, Chamberlain *v.* 1N.R. 30
Postan, Manners q. t. *v.* 3B.&P. 343
Potter, Doe d. *v.* Archer, 1B.&P. 531
Potts, Matthie *v.* 3B.&P. 23
Poulter *v.* Killingbeck, 1B.&P. 397
Powell *v.* Fullerton, 2B.&P. 420
——— *v.* Layton, 2N.R. 365
–, Percy *v.* 3B.&P. 6
Power, Roe *v.* 2N.R. 1
Pratt, Neave *v.* 2N.R. 408
Preston, Jenny d. *v.* Cutts, 1N.R. 308
Price, Eardly *v.* 2N.R. 333
v. Messenger, 2B.&P. 158
Prickett, *Ex parte*, 1N.R. 266
Pringle, Willett *v.* 2N.R. 190
Pritchett, Webb *v.* 1B.&P. 263
Prodger, Birch *v.* 1N.R. 135
Pugh, Constantine *v.* 3B.&P. 184
Puller, Bolton *v.* 1B.&P. 539
Purton *v.* Honnor, 1B.&P. 205
Pye, Ridoat *v.* 1B.&P. 91

Q.

Quick *v.* Sir W. Staines, 1B.&P. 293

R.

Radcliffe, Parkin *v.* 1B.&P. 282. 393
Radnor (Earl of) *v.* Reeve, 2B.&P. 391
Raine, Laing *v.* 2B.&P. 85
Ramsay *v.* Lord Reay, 2N.R. 361
Randall, Tappenden *v.* 2B.&P. 467
Ratcliff *v.* Burton, 3B.&P. 223
Rawley, Abbott *v.* 3B.&P. 13
Rawlins, Buckler *v.* 3B.&P. 111
-- *v.* Perry, 1N.R. 307
Rawlinson, Kidd *v.* 2B.&P. 59
Ray, Castleman *v.* 2B.&P. 383
Read, Goodtitle d. *v.* Badtitle, 1B.&P. *page* 384
Reading, Knowlys *v.* 1B.&P. 311
Reay (Lord) Ramsay *v.* 2N.R. 361
Redit *v.* Broomhead, 2B.&P. 564
Redshaw, Green *v.* 1B.&P. 227
Reed, Clarke *v.* 1N.R. 310
Reeve, Dowse *v.* 2B.&P. 578
———, Earl of Radnor *v.* 2B.&P. 391
Reeves, Hill *v.* 1B.&P. 424
Reynolds *v.* Davis, 1B.&P. 625
Rhodes, Holmes *v.* 1B.&P. 638
Ribbans *v.* Crickett, 1B.&P. 264
Rice *v.* Brown, 1B.&P. 39
——, Lechmere *v.* 2B.&P. 12
Richardson *v.* Goss, 3B.&P. 119
——— Hicks *v.* 1B.&P. 93
Rickard and Others, Hodgson *v.* 2N.R. 389
Ridoat *v.* Pye, 1B.&P. 91
Rigg, Keay *v.* 1B.&P. 11
Roberts, Goodtitle d. *v.* Badtitle, 1B.&P. 385
———, Covington *v.* 2N.R. 378
——— *v.* Eden, 1B.&P. 398
——— *v.* Giddins, 1B.&P. 337
———, Max *v.* 2N.R. 454
Robinson, Barry *v.* 1N.R. 293
——— *v.* Dunmore, 2B.&P. 416
———, Hadkinson *v.* 3B.&P. 388
———, M'Cullock *v.* 2N.R. 352
——— *v.* Smyth, 1B.&P. 454
Rodgers, Furtado *v.* 3B.&P. 191
——— *v.* Lacy, 2B.&P. 57
Roe, Doe d. Baddam *v.* 2B.&P. 55
——, Doe d. Bailey *v.* 1B.&P. 309
——, Fenn d. Buckle *v.* 1N.R. 293
—— d. Helling *v.* Yeud, 2N.R. 214
—— d. Pellatt *v.* Ferrars, 2B.&P. 542
——— Walker *v.* Walker, 3B.&P. 375
—— *v.* Wiggs, 2N.R. 330
Rogers *v.* Sir Jervas Clifton, 3B.&P. 587
——— *v.* Imbleton, 2N.R. 117
——— *v.* Jenkins, 1B.&P. 383
Rorke, Steel *v.* 1B.&P. 307

Rose, Heath *v.* 2N.R. *page* 223
Rotheroe, Greenslade *v.* 2N.R. 132
Rothwell *v.* Cooke, 1B.&P. 172
Rowcroft, Dyson *v.* 3B.&P. 474
Rowe *v.* Power, 2N.R. 1
Rowed, Collins *v.* 1N.R. 54
Rouvellett, Dorant *v.* 2N.R. 247
Royal Exchange Assurance Company, Hurry *v.* 2B.&P. 430
———, 3B.&P. 308
Rucker v. *London Assurance Company*, 2B.&P. 432 *n.*
Ruggles, Fenton *v.* 1B.&P. 356
Rushton *v.* Chapman, 2B.&P. 340
Russel, Farmer *v.* 1B.&P. 296
Russell, Oppenheim *v.* 3B.&P. 42
Rutley, Henshaw *v.* 1N.R. 110

S.

Sabine *v.* Johnstone, 1B.&P. 60
Sadgrove, Kirby *v.* 1B.&P. 13
Saint Barbe, Norville *v.* 2N.R. 434
Saint Quintin, Walwyn *v.* 1B.&P. 652
Saint Saviour's (Wardens of) *v.* Bostock, 2N.R. 175
Salkeld *v.* Lands, 2B.&P. 416
Salte *v.* Thomas, 3B.&P. 188
Samuel, Judin *v.* 1N.R. 43
Sangster *v.* Birkhead, 1B.&P. 303
Sankey, Shirley *v.* 2B.&P. 130
Sargent, Morgan *v.* 1B.&P. 58
Saunders *v.* Pittman, 1B.&P. 33
———, Wilson *v.* 1B.&P. 267
Saunderson *v.* Jackson, 2B.&P. 238
Savage, Whitfield *v.* 2B.&P. 277
Savignac, Stratton *v.* 3B.&P. 330
Scales, Simpson *v.* 2B.&P. 496
Scheibel *v.* Fairbain, 1B.&P. 388
Scholey *v.* Daniel, 2B.&P. 540
——— and Another, Metcalf and Another *v.* 2N.R. 461
Scott *v.* Bourdillion, 2N.R. 213
——— *v.* Godwin, 1B.&P. 67
——— *v.* Pettit, 3B.&P. 469
Scott, Spencer *v.* 1B.&P. *page* 19
——— *v.* Thompson, 1N.R. 181
———, Woodmeston *v.* 1N.R. 13
Scudamore, Doe d. Planner *v.* 2B.&P. 289
——— *v.* Stratton, 1B.&P. 455
Scurry *v.* Freeman, 2B.&P. 381
Seale *v.* Barter, 2B.&P. 485
Searle, Hosier *v.* 2B.&P. 299
Seaver *v.* Spraggon, 2N.R. 85
Secretan, Hill *v.* 1B.&P. 315
Selby, Cobb *v.* 2N.R. 466
Sellar *v.* M'Vicar, 1N.R 23
Senate, Swain *v.* 2N.R. 99
Serres *v.* Dodd, 2N.R. 405
———, Field *v.* 1N.R. 121
Sexton, Pillop *v.* 3B.&P. 550
Sharpe *v.* Ifgrave, 3B.&P. 394
Shaw, Beardmore *v.* 1N.R. 263
——— *v.* Everrett, 1B.&P. 222
Shedden, Decker *v.* 3B.&P. 180
Sheddon, De Symonds *v.* 2B.&P. 153
———, Thellusson *v.* 2N.R. 228
Sheriff, Kerr *v.* 2B.&P. 358
———, Mann *v.* 2B.&P. 355
Shirley *v.* Sankey, 2B.&P. 130
Shrole, Hopkins *v.* 1B.&P. 382
Shum *v.* Farrington, 1B.&P. 640
———, Taylor *v.* 1B.&P. 21
Sidneff, Gray *v.* 3B.&P. 395
Siffkin *v.* Lee, 2N.R. 484
Simpson, Brooker *v.* 2B.&P. 336
——— *v.* Scales, 2B &P. 496
———, Sparks *v.* 2B.&P. 379
———, Strong *v.* 3B.&P. 14
———, Vollume *v.* 2B.&P. 368
Sinclair *v.* Monsieur de France, 2B.&P. 363
Singleton *v.* Butler, 2B.&P. 283
Skinner, Waterhouse *v.* 2B.&P. 447
Slade *v.* Dowland, 2B.&P. 570
———, Martin *v.* 2N.R. 59
Slodden, Hartshorn *v.* 2B.&P. 582
Smart, Chaunt *v.* 1B.&P. 477
———, North q. t. *v.* 1B.&P. 51
Smedley, *Estcott* v. 1B.&P. 349. *n.*
Smee, Wyatt *v.* 1B.&P. 344

Smith, Armstrong v. 1N.R. *page* 299
—— v. Barclay, 3B.&P. 219
—— v. Dickenson, 3B &P. 630
—— v. Goddard, 3B.&P. 465
——, Haille v. 1B.&P. 563
——, Lake v. 1N.R. 174
—— v. O'Kelly, 1B.&P. 75
——, Onslow v. 2B.&P. 384
——, The King v. 2B.&P. 127
—— v. Smith, 2N.R. 473
——, *Stewart* v. 1B&.P. 132. *n.*
—— v. Taylor, 1N.R. 196
—— v. Tyson, 2B.&P. 339
—— v. Whally, 2B.&P. 482
—— v. Woodhouse, 2N.R. 2?3
—— v. Younger 3B.&P. 550
Smyth, Robinson v. 1B.&P. 454
Snibson, Hodgkinson v. 3B.&P. 603
Snow, Chapman v. 1B.&P. 132
Soilleux v. Herbst, 2B.&P. 414
Solomon, Parsons v. 1N.R. 111
Solomonson, Dutton v. 3B.&P. 582
Solyman, Maycock v. 1N.R. 139
Southey, Butler v. 3B &P. 237
Sowerby, Partridge v. 3B.&P. 172
Sparenburgh v. Bannatyne, 1B.&P. 163
Sparkes v. O'Kelly, 2N.R. 421
v. Simpson, 2B.&P. 379
Spencer v. Scott, 1B.&P. 19
Spicer v. Teasdale, 2B.&P 49
Spraggon. Seaver v. 2N.R. 85
Spurrier, Dan v. 3B.&P. 399. 442
Stables v. Ashley, 1B &P. 49
Stacey v. Federici, 2B.&P. 390
Staines (Sir W.) v. Johannot 1B.&P. 200
——————, Quick v. 1B.&P. 293
———, Whitburn v. 2B.&P. 355
Stainforth. Tarlton v. 1.B&P. 471
Stanway, Lord Northwick v. 3B.&P. 346
——— q. t. v. Perry, 2B.&P. 157
Stead v. Izard, 1N.R. 312
Steel v. Alan, 2B.&P. 362: 437
—— v. Rorke, 1B.&P. 307
Steinman, Bush v. 1B.&P. *page* 404
Stevenson v. Danvers, 2B.&P. 109
—— v. Grant, 2N.R. 103
——, Hesse v. 3B.&P. 565
1N.R. 133
——, Jacobs v. 1B.&P. 96
——, Walker, Doe d. v. 3B.&P. 22
Steventon v Watson, 1B.&P. 365
Stewart v. Ball, 2N.R. 78
———, De la Rue v. 2N.R. 362
——— v. *Smith* 1B.&P. 132. *n.*
Stimpson, Gravall v. 1B.&P. 478
Stock v. Mawson, 1B.&P. 286
Stone, Bell v. 1B.&P. 331
Storer, Hardisty v. 1N.R. 123
Stovin v. Perring, 2B.&P. 561
Strahan, Williams v. 1N.R. 309
Stratton v. Savignac, 3B.&P. 330
———, Scudamore v. 1B.&P. 455
Stromboni, Morley v. 3B.&P. 254
Strong v. Natally, 1N.R. 16
—— v. Simpson, 3B.&P. 14
Surman, Evans v. 1N.R. 63
Sutton. Benton v. 1B.&P. 24
——, Meddowscroft 1B.&P. 61
Swain v. Senate, 2N.R. 99
Swanson, De Vignier v. 1B.&P. 346. *n.*
Sykes v. Bauwens 2N.R. 404
—— v. Harrison, 1B.&P. 29
Symmers v. Wason, 1B.&P. 105
Symonds v Cobourne, 1B.&P. 482

T.

Tabbs v. *Bendelack.* 3B.&P. 207. *n.*
Tabrum v. Tenant, 1B &P. 481
Tagg v. Madan, 1B.& P. 629
Taite, Gold-mid v. 2B.&P. 55
Talmash v. Penner, 3B.&P. 12
Tapp v. Lee, 3B.&P. 367
Tappenden v. Randall, 2B.&P. 467
Tarlton v. Stainforth, 1B.&P. 471
Tate, Wood v. 2N.R. 247

Tatlock, Peel *v.* 1B.&P. *page* 419
Tattersall *v.* Groote, 2B.&P. 131. 253
Tatum, Osborn *v.* 1B.&P. 271
Taylor v. *Fenwick*, 3B.&P. 553. *n.*
—— *v.* Hare, 1N.R. 260
—— *v.* Harris, 3B.&P. 549
——, The King *v.* 3B.&P. 596
—— *v.* Shum, 1B.&P. 21
——, Smith *v.* 1N.R. 196
Taynton *v.* Hannay, 3B.&P. 26
Teasdale, Spicer *v.* 2B.&P. 49
Tebb, Hill *v.* 1N.R. 298. 311
Tesseyman *v.* Gildart, 1N.R. 292
Temple, Keate *v.* 1B.&P. 158
Templer *v.* M'Lacklan, 2N.R. 136
Tenant *v.* Elliott, 1B.&P. 3
——, Lightfoot *v.* 1B.&P. 551
——, Tabrum *v.* 1B.&P. 481
Terry, Leatham *v.* 3B.&P. 479
Thellusson *v.* Sheddon, 2N.R. 228
—— *v.* Woodford, 1N.R. 357
Thirkell, Buckworth v. 3B.&P. 652. *n.*
Thomas, Garland *v.* 1N.R. 82
——, Salte *v.* 2B.&P. 188
—— *v.* Ward, 2B.&P. 393
Thompson, Beale *v.* 3B.&P. 405
——, Collett *v.* 3B.&P. 246
—— *v.* Collins, 1N.R. 347
——, Decker *v.* 3B.&P. 319
—— *v.* Jordan, 2B.&P. 137
—— *v.* Lady Lawley, 2B.&P. 303
——, Piggott *v.* 3B.&P. 147
——, Scott *v.* 1N.R. 181
——, Whalley *v.* 1B.&P. 371
Thompson, Webb *v.* 1B.&P. 5
Thornton, *v.* Merredew 3B.&P. 362
Throgmorton, Peters *v.* 1B.&P 387
Thyatt *v.* Young, 2B.&P. 72
Tilt, Bull *v.* 1B.&P. 199
Tingrey *v.* Brown, 1B.&P. 310
Tippet *v.* May, 1B.&P. 411
Tipping *v.* Johnson, 2B.&P. 302. *page* 357
Touteng *v.* Hubbard, 3B.&P. 291
Trapps, Hallewell *v.* 2N.R. 173
Trent *v.* Hanning, 1B&P. 116
Tripp, Longman *v.* 2N.R. 67
Truste, Piggott *v.* 3B.&P. 221
Tuck, Wyburd *v.* 1B.&P. 458
Tucker, Bayley *v.* 2N.R. 458
——, Lord Nelson *v.* 3B.&P. 257
Tunstow, Bradley *v.* 1B.&P. 34
Turner *v.* Bristow, 2B.&P. 38
—— *v.* Eyles, 3B.&P. 456
—— *v.* Hawkins, 1B.&P. 472
—— *v.* Portall, 2N.R. 231
Tyson, Smith *v.* 2B.&P. 339

V.

Van Braham *v.* Isaacs, 1B.&P. 451
Vanderheyden, Goddard v. 1B.&P. 8. *n.*
Vandyke, Meagher *v.* 2B.&P. 370
Van Mildert, Wilson *v.* 2B.&P. 394
Van Millingen, Moffat v. 2B.&P. 124. *n.*
Vaughan, Angerstein v. 1B.&P. 222. *n.*
—— *v.* Barnes, 2B.&P. 392
——, Calliand *v.* 1B.&P. 210
——, Parker *v.* 2B.&P. 29
—— *v.* Whitcombe, 2N.R. 411
Vaux *v.* Ansell, 1B.&P. 224
Vernon, Jennings *v.* 3B.&P. 361
——, *Marchington* v. 1B.&P. 101. *n.*
Vollum *v.* Simpson, 2B.&P. 368

W.

Waddington *v.* Bristow, 2B.&P. 452
—— and Others, Bristow and Others *v.* 2N.R. 355
—— *v.* Oliver, 2N.R. 61
Waghorne *v.* Langmead, 1B.&P. 571
Wagstaff,

Wagstaff, Crowder v. 1B.&P. *page* 18
Wainewright, Field v. 3B.&P. 39
Walker v. Bayley, 2B.&P. 219
——— v. Constable, 1B.&P. 306
———, Doe d. v. Steyenson, 3B.&P. 22
———, Roe d. v. Walker, 3B.&P. 375
——— v. Wright, 3B.&P. 564
Wall, Morris v. 1B.&P. 208
Wallace v. Arrowsmith, 2B.&P. 49
Walsh v. Davis, 2N.R. 245
Walter, Curry v. 1B.&P. 525
Walters, Newman v. 3B.&P. 612
Walton, Woodward v. 2N.R. 476
Walwyn v. St. Quintin, 1B.&P. 652
Warburton, Owen v. 1N.R. 326
Wanklen, Goodtitle d. v. Baditile, 2B.&P. 120
Ward, Cheetham v. 1B.&P. 630
——— v. Harris, 2B.&P. 295
———, Thomas v. 2B.&P. 593
Wardens of St. Saviour's v. Bostock 2N.R. 175
Warlters, Lees v. 2B.&P. 465
Wason, Symmers v. 1B.&P. 105
Waterfield, Williams v. 1B.&P. 334
Waterhouse v. Skinner. 2B.&P. 447
Watson v. Christie, 2B.&P. 224
———, Steventon v. 1B.&P. 365
Watt v. Daniel, 1B.&P. 425
Watts v. Hart, 1B.&P. 134
———, Jefferies v. 1N.R. 153
Weaver, Evans v. 1B.&P. 20
Webb, Beard v. 2B.&P. 93
——— v. Herne, 1B.&P. 281
——— v. Matthew, 1B.&P. 225
——— v. Pritchett, 1B.&P. 263
——— v. Thomson, 1B.&P. 5
Weddall v. Berger, 1B.&P. 325
Weldon, Astley v. 2B.&P. 346
Welles, Sir H. Goring v. 1B.&P. 395
Wells, Gibson v. 1N.R. *page* 290
Wenell v. Adney, 3B.&P. 247
Wennington, Holmes v. 2B.&P. 399 *n.*
Westcote, Penfold v. 2N.R. 335
Wetherill, Wilkins v. 3B.&P. 220
Wetton, Doe d. Barnfield v. 2B.&P. 324
Whaley v. Pajot, 2B.&P. 51
——— Payne v. 2 B.&P. 137
Whalley, Buck d. v. Nurton, 1B.&P. 53
———, Smith v. 2B.&P. 482
——— v. Thompson, 1B.&P. 371
Wheeler, Atkins v. 2N.R. 205
——— v. Heseltine, 2B.&P. 560
Whitbread v. May, 2B.&P. 593
Whitburn v. Staines, 2B.&P. 355
Whitcombe, Vaughan v. 2N.R. 411
White, Brooke v. 1N.R. 330
——— v. Dent, 1B.&P. 341
———, Goodtitle d. Castle and Another v. 2N.R. 383
———, Holland v. 2B.&P. 341
——— v. Wilson, 2B.&P. 116
Whitelock v. Heddon, 1B.&P. 243
Whitfield v. Savage, 2B.&P. 277
Whitmore, Perchard v. 2B.&P. 155. *n.*
Whitwell v. Bennett, 3B.&P. 559
Wiffin v. Kincard, 2N.R. 471
Wiggs, Roe v. 2N.R. 330
Wilkins v. Wetherill, 3B.&P. 220
Willes v. Glover, 1N.R. 14
———, Mountford v. 2B.&P. 337
Willett v. Pringle, 2N.R. 190
Williams v. Bartholomew, 1B.&P. 326
——— v. Breedon, 1B.&P. 329
——— v. Brown, 3B.&P. 69
———, Partington v. 2N.R. 398
——— v. Strahan, 1N.R. 309
——— v. Waterfield, 1B.&P. 334
Williamson v. Butterfield, 2B.&P. 63

Willis *v.* Pendrill, 2N.R. *page* 167
Willows *v.* Ball, 2N.R. 376
Wilson q. t. *v.* Gilbert, Clerk, 2B.&P. 281
——— *v.* Harris, 2B.&P. 320
———, Marryatt *v.* 1B.&P. 430
——— *v.* Saunders, 1B.&P. 267
——— q. t. *v.* Van Mildert, 2B.&P. 394
———, White *v.* 3B.&P. 116
Wilton *v.* Hamilton, 1B.&P. 445
——— *v.* Place, 2B.&P. 56
Winchelsea (Earl of), Sir E. Deering *v.* 2B.&P. 270
Winder *v.* Wood, 3B.&P. 118
Wise, Faulkner *v.* 2B.&P. 150
Wolff *v.* Horncastle, 1B.&P. 316
Wood, Fenn d. Blanchard *v.* 1B.&P. 573
—— *and Others* v. *Folliott*, 3B.&P. 552. *n.*
—— *v.* Tate, 2N.R. 217
——, Winder *v.* 3B.&P. 118
Woodford, Thellusson *v.* 1N.R. 357
Woodhouse, Lang *v.* 1B.&P. 31
———, Smith and Another *v.* 2N.R. 233
Woodward *v.* Walton, 2N.R. 470
Woodmeston *v.* Scott, 1N.R. *page* 13
Woolcott, Butler *v.* 2N.R. 64
Wright *v.* Bond, 2N.R. 129
———, Browning *v.* 2B.&P. 13
——— and Others, Doe d. *v.* Child, 1N.R. 335
——— and Others, Hopgood *v.* 2N.R. 188
———, Leeds *v.* 3B.&P. 320
———, Pinero *v.* 2B.&P. 235
——— *v.* Walker, 3B.&P. 564
Wyatt *v.* Smee, 1B.&P. 344
Wyburd *v.* Tuck, 1B.&P. 458
Wye *v.* Fisher, 3B.&P. 443
Wylie, *Bryson* v. 1B.&P. 83. *n.*
———, The King *v.* 1N.R. 92

Y.

Yea (Sir W.), Sir B. Hammett *v.* 1B.&P. 144
Yeud, Roe d. Helling *v.* 2N.R. 214
Young, Bishop *v.* 2B.&P. 78
———, Newton *v.* 1N.R. 187
———, Thyatt *v.* 2B.&P. 72
Younger, Smith *v.* 3B.&P. 550

ERRATA

To the Second Volume of NEW REPORTS.

Page 191. column 2, line 3 from bottom, *for* M'Knight *read* Copland.
192. ——————16. *for* before verdict the 16th *read* before. The verdict was on the 26th.

THE REPORTERS, finding themselves unable to promise the same attention to any future labours which they have endeavoured to bestow upon those already submitted to the Public, think it right to surrender into other hands an occupation in which they have now been engaged above eleven years. They cannot, however, conclude their work without again expressing their gratitude for the uniform kindness and ready assistance which they have received during its prosecution from all parts of the Profession, and especially from the Members of the Court of Common Pleas.

JULY 29th,
1808.

CASES

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND IN THE

HOUSE OF LORDS,

IN

Michaelmas Term,

In the Forty-sixth Year of the Reign of GEORGE III.

SOUTHERN REGIONAL LIBRARY 1859

(IN THE HOUSE OF LORDS.)

EBENEZER RADFORD ROWE, Plaintiff in Error, *v.* RICHARD POWER, on the several Demises of RICHARD BOYCE and WILLIAM HOBBS, Defendant in Error. *July* 11th.

THIS was an ejectment commenced on the plea side of his Majesty's Court of Exchequer in Ireland, in *Hilary* term 1791, by the above nominal Defendant in error,

A. seised in fee devised to *B.* his son for life, remainder to the heirs of his body in tail, remainder to his own

three daughters and their heirs, on the death of *A.*, *B.* entered and became seised of all *A.*'s lands, and by deed between himself and his mother, assigned to her the possession of a third part of all the premises, to hold to her and her assigns for her life, as if she had been in possession of the same by virtue of a writ of dower, and appointed *C.* and *D.* attornies to enter and give livery and seisin of one full third part; and the indorsement of the deed stated that *C.* and *D.* delivered seisin of all the premises to the mother to hold according to the uses and intentions of the deed. *B.*'s mother having become seised of an undivided third part of all the lands, and during

1805.

ROWE v. POWER.

error, in order to recover an undivided third of divers messuages, lands, and hereditaments in the several baronies of *Forth* and *Barcy* in the county of *Wexford;* and the declaration contained two demises, 1st, a demise of the 1st of *January* 1781 of an undivided third of the lands and tenements from *Richard Boyce*, for 41 years from the said 1st of *January* 1781, and, 2dly, a demise of the same date of an undivided third of the same estate from *William Hobbs*, for the term of 41 years from the said 1st of *January* 1781. The cause was tried at bar in the Court of Exchequer in *Ireland*, on the 3d *May* 1798, and the evidence produced on the part of the then Plaintiff was to the following effect: That *Richard Rowe* the elder, Esq. was seised in fee of the lands, and so seised died 6th *May* 1724, leaving *Elizabeth Rowe* his widow, *Richard Rowe* his only son, and three daughters, namely, *Elizabeth Boyce*, *Ann Rowe*, and *Dorothy Rowe;* that before his death, namely, 17th *March* 1723, he made his last will, in presence of three subscribing witnesses; that he thereby devised the whole lands and premises in the declaration mentioned to the said *Richard Rowe*, his only son, for his life, and after his decease to the heirs of his body in tail; and for default of such heirs, to testator's three daughters, *Elizabeth Boyce*, otherwise *Rowe*, *Ann Rowe* and *Dorothy Rowe*, and their heirs;

during her life *B.* levied a fine *sur conusance de droit come ceo*, with proclamations of the whole of the premises, and suffered a recovery, and died leaving no issue, but having devised away all the lands of *A.* to a stranger.

Held that the deed between *B.* and his mother, and the livery made thereon, was a good assignment of dower to her; and therefore the fine and recovery suffered by *B.*, and non-claim within five years after the death of *B.*, did not bar the remainder in fee to the daughters of *A.* in that one third part which *B.*'s mother had in dowry at the time of such fine and recovery.

A declaration in ejectment contained two demises by two different lessors of two distinct undivided thirds; judgment was given that the Plaintiff "do recover his said terms." On error it appeared from the facts stated on a bill of exceptions to the Judge's directions on a point of law, that the ejectment respected only one undivided third; held well enough on this record, where the point was only raised by bill of exceptions.

Semb. that it would have been well even on special verdict.

that

1805.

ROWE v. POWER.

that *Richard Rowe* the younger entered and became seised of the entire lands; that by a deed dated 18th *November* 1724, between the said *Richard Rowe* of one part, and his mother said *Elizabeth Rowe* of the other, he, (that she might be in possession of her thirds of the said premises as if by a writ of dower, and for other the considerations therein mentioned,) gave, granted, assigned, and set over to her the possession of the full third part of all the denominations of the premises, to have and to hold the said third to her and her assigns for her life, to all intents, purposes and constructions, as if she had been in possession of the same by virtue of a writ of dower: that by the said deed the said *Richard Rowe* the younger did constitute *Wm. Harvey* and *Nathaniel Boyce*, or either of them, for him and in his name, to enter on the premises, and of every part thereof to give to the said *Eliz. Rowe* livery and seisin of one full third part, in as full a manner as if the same had been done by him the said *Richard Rowe* the younger; that an instrument was executed by the said *Wm. Harvey* and *Nathaniel Boyce* by way of indorsement on the said deed, being a memorandum, that, pursuant to their power by the deed, they had, on the 24th of *November* 1724, delivered to the said *Eliz. Rowe* seisin of all the therein mentioned lands and premises, by delivering to her upon every denomination of them a sod and twig to hold to her according to the uses and intentions of the deed; that the said *Eliz. Rowe*, immediately on execution of the said deed of 18th *November* 1724, entered upon and became seised of the undivided third part of all the lands in the said deed contained, and in the said declaration in ejectment mentioned, under and by virtue of the said deed and indorsement; and from the date of the said deed till her death in 1759 she continued to be so seised; that upon execution of the said deed, and before levying the fine after mentioned, and after the said *Eliz. Rowe* became seised, the said *Richard Rowe* the younger entered upon and held the house and

1805.

ROWE v. POWER.

demesne-lands of *Bullyharty*, being part of the premises, paying to her the whole of her life an annual rent for one-third of the said house and demesne-lands, and continued to hold the same during his life.

The evidence produced on the part of the then Defendant (now Plaintiff in error) was to the following effect: That in *Trinity* term 1730, the said *Richard Rowe* the younger levied a fine *sur conusance de droit come ceo*, with proclamations, of the whole of the premises in the declaration mentioned, and in the same term and year suffered a common recovery of them; that on the 13th *January* 1769, the said *Richard Rowe* the younger made his last will in writing, in the presence of three subscribing witnesses, and devised the premises in the declaration mentioned to the said *Ebenezer Radford Rowe*, the then Defendant, and now Plaintiff in error, for his life, with remainders to his first and other sons successively in tail male, with remainders over; that the said *Richard Rowe* the younger died on the 20th *March* 1769, without revoking his said will, unmarried and without issue; that the three sisters of the said *Richard Rowe* the younger died; and *Ann*, who married *Michael Hobbs*, was the survivor of the three sisters, and died in 1780, leaving *Wm. Hobbs*, one of the lessors of the Defendant in error, her eldest son and heir; that the then Defendant (now Plaintiff in error,) who is the devisee named in the said will of *Richard Rowe* the younger, on the death of the said *Richard Rowe* entered into and became possessed of the said lands.

The Counsel for the then Defendant thereupon insisted, that the said fine of *Trinity* term 1730, with proclamations, there not having been an actual entry into the said lands in the declaration mentioned within five years after the death of *Richard Rowe* the younger, was a bar to the title of the then Plaintiff, and now Defendant in error, and that the Judges upon that ground ought to direct the jury to find a verdict for the Defendant, the

now Plaintiff in error: but the learned Judges declared that the said fine with proclamations was not a bar. The Counsel for the then Defendant (the now Plaintiff in error) tendered a bill of exceptions to the opinion of the Judges, and prayed them to sign the same; which was done accordingly, pursuant to the statute in that case made.

The jury then found a verdict for the Plaintiff below, (now Defendant in error,) with 6*d.* damages and 6*d.* costs; and the Judgment of the Court was, that the Plaintiff below, (now Defendant in error,) should recover against *Ebenezer Radford Rowe*, *his said terms* as yet to come of and in the lands and tenements aforesaid, with their appurtenances in the said declaration specified, and his said damages, with costs *de incremento*.

Upon this judgment the Defendant below (now Plaintiff in error) brought a writ of error in the Exchequer-chamber in *Ireland*, and assigned for error "that the said judgment in form aforesaid was given to the said *Richard Power* against the said *Ebenezer Radford Rowe*, whereas by the law of the land judgment in the said plea ought to have been given for the said *Ebenezer Radford Rowe* against the said *Richard Power*; and that by the said record it appears, that the said *Richard Power* has declared for two whole thirds, in three parts to be divided, of all the lands in the said declaration mentioned, on demises from *Richard Boyce* and *William Hobbs*, and judgment hath been given that he recover the said term, though it most manifestly appears by the said record that the Plaintiff cannot have any title thereto; and that by the said record it appears that a good, valid, and effectual recovery was suffered and had of all said lands, barring all remainders and reversions over and precluding the Plaintiff from recovery in this action; and that it appears by the said record, that a good and valid fine with proclamations was levied of the said lands, thereby barring said Plaintiff from

1805.

ROWE v. POWER.

recovering in this action; and that by the said record it appears that the said *Elizabeth* never was seised of any of the said lands in dower: wherefore the said *Ebenezer Radford Rowe* prays, that the judgment aforesaid by reason of the aforesaid errors, and of the other errors appearing in the record and in the process and proceedings aforesaid, be reversed and wholly had for nought; and that the said *Ebenezer Radford Rowe* may be restored to all things which he lost on occasion of the aforesaid judgment; and that the said *Richard Power* may rejoin to the said errors."

The Defendant in error in the *Irish* Exchequer-chamber pleaded *in nullo est erratum*, and the judgment was there affirmed by the Lord Chancellor and the two Chief Justices.

On this judgment of the Court of Exchequer in *Ireland*, and judgment of affirmance by the Court of Exchequer-chamber, the present writ of error was brought, and the following errors were assigned; 1st, that the declaration is not sufficient in law to maintain the action; 2d, that the Barons of the said Exchequer declared the said fine with proclamations to be no bar; but should have declared the said fine with proclamations, there not having been an actual entry into the lands within five years after the death of the said *Richard Rowe* the younger, a bar to the Plaintiff's title and recovery in the plea aforesaid, and should on that ground have instructed the jury to find for the Defendant, (the Plaintiff in error;) 3d, that the Barons of the Exchequer in *Ireland* declared the said fine not to be a bar generally, and so the jury found a general verdict for the Plaintiff; whereas the said Barons should have declared the said fine to be a bar to the Plaintiff's title and recovery of the one-third in the first count of the said declaration mentioned; 4th, that the verdict is for the Plaintiff upon both counts of the said bill and declaration, instead of being for the defendant *Rowe* on the first

first count; 5th, that the said Barons of the said Exchequer did not declare to the said jury the said common recovery by the said *Richard Rowe* the younger to be a bar to the Plaintiff's title and recovery; 6th, that the said Barons did not direct or leave it to the jury to presume in support of the said recovery the joining of the said *Elizabeth Rowe* the widow in making a tenant to the *præcipe* for the said recovery by some deed afterwards lost; 7th, that the said Barons did not direct the jury to find, that the said feoffment and fine were a discontinuance of the estate tail created by the will of *Richard Rowe* the elder; 8th, that the said verdict and judgment were given for the Plaintiff *Richard Power* against the said *Ebenezer Radford Rowe*, instead of being given for him; 9th, that the jury have assessed damages for the trespass and ejectment in entering upon the whole of the premises in the declaration mentioned, of which the Plaintiff is thereby supposed to be entitled to possession of two undivided thirds; 10th, that the judgment of the said Barons is for a recovery by the said Plaintiff of the said *terms*, of and in the said lands and tenements aforesaid, though according to the record he could only be entitled to one of them; 11th, that the said judgment was affirmed in the said Court of Exchequer-Chamber, whereas it should have been reversed. To this assignment of errors was added a prayer by the Plaintiff in error for a *certiorari* to the Treasurer and Barons of the Exchequer in *Ireland*, and to have the said judgment and the affirmance of it reversed.

The Defendant in error rejoined *in nullo est erratum*, and prayed an affirmance of the said judgment.

The reasons in support of the writ of error were in substance as follows:

1st, The point at the trial was, whether, on the will of *Richard Rowe* the father, connected with the assignment of a third by *Richard Rowe* the son to his mother for her

1805.

ROWE v. POWER.

dower, and with his subsequent fine and recovery, and with the other facts disclosed by the bill of exceptions, such fine by *Richard Rowe* the son and the non-entry of the lessors of the Defendant in error till after five years, were not a bar to the Defendant in error, for the undivided third, which is all the lessors of the Defendant in error claim to be entitled to in the estate described in the record. The ground upon which it has been attempted for the lessors of the Defendant to avoid the bar from the fine for the undivided third in question is, that, at the time of the fine, the freehold in possession was in the mother of *Richard Rowe* the younger, under his assignment of dower to her, and therefore that his fine did not arrest the remainder in fee to his three sisters. But this ground may be resisted by presenting two aspects of the case. One is, with reference to the inadequacy of the assignment of dower to pass the freehold to the mother: the other is, with reference to the effect on the remainder in fee to the three sisters from passing the freehold to her, if it really did pass. As to the inadequacy of the assignment of dower to pass the freehold, it was by a deed of conveyance from *Richard Rowe* the younger to his mother for life, with livery of seisin, by two attornies under an authority given to them by the deed. But it is submitted on the part of the Plaintiff in error, that the livery of seisin was not according to the authority; and therefore was void. The deed of assignment of dower from Mr. *Richard Rowe* the younger contained an authority from him to the two attornies in his name to enter upon every denomination of the lands, and to deliver to his mother seisin of one full third part, in as ample a manner as if he had done it personally by himself. But the memorandum of livery, as indorsed on the deed and signed by the two attornies, is a departure from the terms of the authority; for according to the indorsed memorandum, the attornies delivered seisin

seisin to her, not of one full third part of every denomination of the lands as the authority requires, but of all the lands, by delivering to her upon every denomination a sod and twig. Nor was this the whole of the departure from the deed containing the authority. The deed was a conveyance from the son to the mother of the full third part of all the denominations of lands for her life, to all intents and purposes and constructions, as if she had been in the actual possession by virtue of the writ of dower or other process in law; and the authority to deliver seisin was to be executed so as to give effect to the deed accordingly. But the deed is not of an undivided third. It is of a full third part of the lands to all intents, as if she had been put into possession by a writ of dower, or other process of law, that is, of her dower, as a legal assignment, if she had brought her writ of dower, would have put her into possession of it; and it is to be recollected, that such a possession would have been of a divided third part, that is, the entirety of a divided third of the lands; or, to use the more forcible language of *Littleton* in the beginning of his chapter of Dower, a third part of the lands to hold the same in severalty by metes and bounds. But the livery by the two attornies is expressed to have been in a manner totally different. Instead of being of a divided third by metes and bounds in severalty, it is not of a third of any kind. It is not either of a divided third or of an undivided third. But it is, in letter at least, of a totality without any description or other expression to define in what parcels of the lands.

Now if this was a void conveyance, the freehold did not pass to the mother but remained with the son, as if no such deed of assignment of dower had been executed; and then the only ground on which it can be attempted to avoid the bar from the fine, namely, that, for one third the freehold was out of the possession of *Richard Rowe* the son at the time of the fine, and therefore that the plea of

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1805.

ROWE v. POWER.

quod partes finis nihil habuerunt lies against the fine, and that so the fine could not devest or displace the remainder to the three sisters, becomes wholly subverted. Nor is it any answer, that a legal assignment of dower after the husband's death may be, without livery of seisin, either by the sheriff under the King's writ, or by the heir or other tenant of the land by consent and agreement between such persons and the widow; and that livery of seisin is not necessary to any assignment of dower, because assignment of dower is of common right. Both of these doctrines are in *Coke* upon *Littleton fol.* 34. *b.* and 35. *a.* and the Plaintiff in error does not controvert either of them. But to be legal, an assignment of dower, as has been already shewn from *Littleton* himself, in the first section of his chapter of Dower, must be of a divided third in severalty by metes and bounds: and if it is not that, it is not what the law means by assignment of dower, and so like every ordinary feoffment without livery of seisin is, so far as passing the freehold of an incorporeal hereditament comes into question, a nullity. Lord *Coke* also in *fol.* 34. of his Commentary writes, that an assignment of dower, where the husband is sole seised, as *Richard Rowe* the father was in the present case, cannot be made of the third part in common, but ought to be in severalty; which must mean, that the third assigned should be a divided third by metes and bounds, as otherwise there would necessarily be a tenancy in common between the wife and the tenant of the freehold subject to the dower. Indeed the position of Lord *Coke*, in respect of its being stated generally and without any express exception, has been denied; and in the thirteenth edition of *Coke* upon *Littleton*, *note* 1 *of fol.* 34. *b.* there is a notice from Lord *Hale* of its having been adjudged *contrà* with a reference to a preceding annotation by him, which is *note* 1. to *fol.* 32. *b.* of the same edition, and explains what is meant by Lord *Hale*'s referring to an adjudication *contrà*

to

1805.

ROWE v. POWER.

to Lord *Coke*'s assertion as to the necessity of metes and bounds in an assignment of dower. From the explanation, so referred to by Lord *Hale* himself, it appears, that the adjudication *contrà*, he had in view, was a judgment of the upper bench in *Couch* or *Coats* and *Lambert*, *Trin.* 1651. But that case was not of an assignment of dower without metes and bounds, by a tenant in tail. It was of an assignment by an heir seised in fee. This is clearly proveable by the report of the case both in 1 *Roll. Abr.* 682. X. *c. pl.* 3., where *Rolle*, then Ld. Chief Justice, fully states the judgment in it, which was upon a special verdict. The reasoning of the Court not only in *Rolle*'s Report, but in the report of the same case in *Style*, 276., which is less full in stating the case, but in some respects is rather more full in giving the ground of the judgment, is on the principle, that both the heir and the wife were competent to agree to a waiver of the metes and bounds; and that though a lessee for years of the lands, subject to whose term the heir took the fee, was admitted to be prejudiced by the dower's not having been assigned in severalty, yet because his interest was only a chattel, and the assignment therefore did not touch his freehold, he was bound. Lord *Hale*'s own account of the case also imports, that the case was of an assignment by an heir having the fee; for he put the case of an assignment by the husband's heir, without the least mention of any entail. But an assignment of dower in deviation from the legal course, by one having the legal fee of land subject to dower, and therefore by one competent to bind all deriving under him by a special agreement with the widow, is clearly distinguishable from such an assignment of dower by a tenant in tail, who, though he may bar his issue and those in remainder by fine and recovery, cannot otherwise bind their inheritance, any more, by so transacting an exchange, with the widow, of the legal dower of a *divided* third by metes and bounds in severalty, for the dower of an *undi-*

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1805.

ROWE v. POWER.

vided third, prejudicing the issue and those in remainder or reversion through the establishment of a tenancy in common over the whole estate, than by alienating for any other purpose. Therefore the Plaintiff in error submits, that the nullity of the deed of assignment of dower in the present case, from the want of a livery of seisin according to the authority of the two attornies appointed by *Richard Rowe* the younger, cannot be obviated, by attempting to support the assignment as sufficient, without any livery, upon the authority of the case of *Couch* and *Lambert*, or otherwise. Indeed if it be necessary the Plaintiff in error claims to controvert *Couch* and *Lambert*, and insists that an assignment of dower by deed without livery, though from an heir seised in fee, is not within the privilege of passing freehold without livery, unless the mode of assignment be such as the law prescribes; and that Lord *Coke*'s doctrine at least appears against the judgment in *Couch* and *Lambert*, and possibly on research other authorities might be found against that judgment. Besides, it is humbly submitted, whether it be not a further objection against the livery by the two attornies constituted by the deed of feoffment from *Richard Rowe* the younger to his mother, that the deed was not by deed poll, but was by deed between him of the one part and her of the other part, and that the letter of attorney from him authorising livery was to two other persons without making them parties. This objection arises from Lord *Coke*'s distinction in his Commentary upon *Littleton*, *fol.* 52. *b.* according to which a letter of attorney may be contained in a deed poll, because one continent may contain divers deeds to several persons; but if it be by feoffment by indenture between the feoffor on the one part and the feoffee on the other part, there a letter of attorney is not good, unless the attorney be made in the deed indented. This objection may perhaps appear to be one of great strictness, and to be almost merely formal; it must also

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1805.

ROWE v. POWER.

be confessed, that Lord *Coke*'s opinion in favour of its validity, though decisively expressed by him, is contradicted by several authorities. One is the case of *Moyle* v. *Ewer*, in the King's Bench, *Mich.* 44 & 45 *Elizabeth*, and reported *Cro. Eliz.* 905.; for, according to Judge *Croke*'s report, Lord *Coke*, then attorney-general, urged against a letter of attorney to deliver seisin, that the deed was an indenture between two parties, with letter of attorney to a third, who was a party, and that therefore the letter of attorney was void; but all the Court held it good enough in respect of there being many such indentures with such letters of attorney, and of its being the case of a common assurance. Another authority is *Dicker* v. *Molland*, which as to this point is in 2 *Rol. Abr.* 8 & 9. and *Noy*, 93., and in both without date; but as to other points is in *Palm.* 508., and there appears to have been in 20 *Jam.*, and in this case *Rolle* and *Noy* concur in stating the Court of King's Bench to have held such a letter of attorney good. Further, there is a direct contradiction of Lord *Coke* on this point in *page* 217. of the *Touchstone*, which book, though fathered by *Sheppard*, who published it as his own, is understood to be of higher lineage, and has been with some probability attributed to Judge *Doderidge*, and well deserves to be considered as no mean authority. However, as these two cases, which seem to have furnished the chief ground of contradicting Lord *Coke*, were prior to the first edition of *Coke* upon *Littleton*, and that yet Lord *Coke* persevered in holding such letters of attorney bad, in conformity to the objection he himself had taken in the former of them, it may also deserve some attention, that in his second *Institute*, 673. he asserts the principle of the objection as one applicable to deeds in general, by laying it down as a general rule, that in the case of a *reciprocal indenture*, that is, a deed between parties on the one side and parties on the other, *no bond, covenant, or grant can be made to or with any that is*

not

1805.

ROWE v. POWER.

not party to the deed. Nay, there Lord *Coke* not only refers to *fol.* 52. of his first *Institute* and other authorities in print to that effect, but in further proof of the general doctrine, cites an adjudication in favour of it by the King's Bench, *Trin.* 29 *Eliz.* in the case of *Scudamore* v. *Vandenbendy* on an indenture of charter-party. What renders Lord *Coke*'s adherence to his opinion in *fol.* 52. *b.* of his Commentary upon *Littleton* the more pointed is, that in his second edition he added to the margin a notice to his readers, that the maxim of common errors sometimes making law was said to have made the law to the contrary of what he advances: the added words in the margin being, *communis error facit jus, ut dicitur in contrarium.* This shews, that he persevered in his original opinion, with full knowledge both of the impression of others to the contrary, and of the ground of that impression. Nor is it material that those who differed from him impliedly admitted the principle of the law to be with him; for instead of denying it, they relied on the urgency of the claim to exempt the particular case from the frequency of the practice of having indentures of feoffment with letters of attorney to persons made parties, and from the impression of there being a common error of its being legal so to make attornies for livery of seisin; and further that Lord *Coke*, by his *ut dicitur* in all the marginal notes he added to his second edition of his Commentary on *Littleton*, seems to represent the asserted prevalency of such a common error as a mere *dictum* of those who differed from him. As to the effects of the assignment of dower, if it did pass the freehold of an undivided third to the mother of *Richard Rowe* for her life, it passed it tortiously and illegally; and so to the extent of the duration of his mother's life-estate discontinued his estate tail, and the expectant remainder in fee to his sisters, and reduced both to mere rights of action by writ of *formedon*, and constituted in himself a

1805.

ROWE v. POWER.

reversion in fee terminable on expiration of the mother's life-estate in his lifetime. As to the first branch of this proposition, it is submitted, that it is already proved; for it has been already shewn from *Littleton* and *Coke*, that an assignment of dower, unless it be by a tenant in fee, where the seisin is of an entirety, cannot be legally made otherwise than of a divided third in severalty and by metes and bounds; and that, if it was not for adjudication in the beforementioned case of *Couch* and *Lambert* in 1651, it would be more than questionable, whether even a tenant in fee solely seised could, by mere agreement with a widow, and without feoffment with livery, pass a legal estate in dower to her by assigning an undivided third. In effect, therefore, an assignment of dower in the form of an undivided third by a tenant in tail solely seised if it be with a good and operative livery, is nothing more or less than a lease or feoffment for life by tenant in tail not warranted by the enabling statute of the 32d of *Henry* the Eighth. The other branches of the same proposition are proveable out of section 620 of *Littleton*'s Tenures and Lord *Coke*'s Commentary upon that section. *Littleton*'s words, literally translated from the first edition, namely, the very rare edition by *Letton* and *Machlinia*, in the possession of Earl *Spencer* and some few others, (which section, even in the thirteenth and two subsequent editions, though intended to include all corrections the first edition supplies, is not quite accurately given) are as follows: "If I give lands "to another in the tail, and he leases the same to ano- "ther for term of life of the lessee, *&c.* in this case the "tenant in tail hath indeed a new reversion in fee-sim- "ple: because when he makes lease for term of life, *&c.* "he discontinues my reversion, and it behoves, that the "reversion of fee-simple be in some person in such case, "and it cannot be in me who am donor, insomuch that "my reversion is discontinued; therefore it behoves,

"that

1805.

ROWE v. POWER.

"that the reversion of fee be in the tenant in the tail, "who continues my reversion by such lease," &c. Here *Littleton* not only affirms, that the lease by tenant in tail to another for his life is a discontinuance of the donor's reversion in fee, creating a new reversion in fee in the tenant in tail; but explains the principle of the law so stated. Lord *Coke*, in his Comment, follows up the doctrine of his great master by an explanation of *Littleton*'s meaning, where he calls the new reversion *a new reversion in fee-simple*; lest the reader, not being arrived at a subsequent part, where *Littleton* himself gives in effect a like explanation, should incautiously for a moment extend those words further than *Littleton* intended. To prevent this, *Coke*, guided by the most punctilious anxiety to prevent the supposition of a departure in *Littleton* from his usual excellence of stating the profundity of abstruse legal doctrine in terms of the most exemplary precision, observes on those words, that they "must be understood "of a *fee-simple determinable upon the life of the lessee*, "which our author here calleth a fee simple: for if the "lessee dieth, the donee is tenant in tail again, as he "was before: and that is the reason, that if in that case "he granted over the reversion and dieth, and after the "death of tenant in tail the lessee dieth, the entry of the "issue is lawful, because by the death of the lessee the "discontinuance is void also." With these great authorities, directly applying to the present case, if *Richard Rowe* the son's assignment of dower was in effect a lease for life not warranted either as an assignment of dower, or as a lease under the enabling statute of 32d of *Henry* the Eighth, such lease was a discontinuance of his estate tail and the remainder in fee to his sisters, and as such operated to the extent of creating a new reversion in fee under the qualification of being determinable by the death of his mother the lessee for life in the lifetime of him the tenant in tail. The second

and

1805.

ROWE v. POWER.

and other proposition is, that the fine by *Richard Rowe* the son, subsequently to his assignment of dower to his mother by the illegal lease for her life, being equivalent to a grant of the reversion to the conusee of the fine, vested the new reversion in fee in him; and that by the subsequent death of the mother and lessee for life in the lifetime of him *Richard Rowe* the son, such reversion in fee became executed in possession, and so the discontinuance was enlarged into as absolute and effectual a discontinuance in fee, as if the tenant in tail *Richard Rowe* the son had originally made a feoffment in fee with livery. In proof of the whole of this proposition, *Littleton* and *Coke* may be again resorted to, and as it is conceived with equal effect. *Littleton*, in section 620, immediately after the passages already translated from the edition by *Lettou* and *Machlinia*, his words being literally translated, proceeds thus: "And if in this case the tenant "in tail grants by his deed this reversion in fee to another, "and the tenant for term of life attorns, &c. and after- "wards the tenant for term of life dies, living the tenant "in the tail, and the grantee of the reversion enters, *&c.* "in the life of the tenant in the tail, then this is a discontinuance in fee, and if afterwards the tenant in the tail "dies, his issue cannot enter, but is put to his writ of "*formedon:* and the reason is, because he, who had the "grant of such reversion in fee simple, had the seisin "and execution of the same lands or tenements, to have "to him and his heirs in his demesne as of fee in the "life of the tenant in the tail. But in this case, if the "tenant in the tail, who grants the reversion, *&c.* dies "leaving the tenant for term of life, and afterwards he, "to whom the reversion was granted, enters, *&c.* then "this is not a discontinuance, but that the issue of the "tenant in the tail shall well enter on the grantee of the "reversion; because the reversion, which the grantee "had, *&c* .was not executed in the life of the tenant in the "tail." In these passages *Littleton* strongly distinguishes

1805.

ROWE v. POWER.

the case of the new reversion in fee executed in, that is, come into actual possession of, the grantee of the tenant in tail discontinuor by the death of the latter's lessee for life in his the discontinuor's lifetime, from the case of the new reversion in fee not so executed in the grantee till after the discontinuing tenant in tail's death; peremptorily stating the discontinuance in the former case to become absolute, and to put the issue in tail to their *formedon*, but in the latter case to terminate, and so to leave a right of entry in the issue. Lord *Coke* also commenting upon these passages, illustrates the former part of the distinction, between the reversion in fee executed in the grantee in the lifetime of the tenant in tail discontinuor and the reversion in fee not so executed in his lifetime, by observing, "that when the reversion in this case is "executed in the life of tenant in tail, it is equivalent "in judgment of law to a feoffment in fee; for the estate "for life passed by livery." Further he illustrates the effect of such execution of the reversion in fee in making the discontinuance absolute, by adding, a little lower in the same page, that "if tenant in tail make a lease "for the life of the lessee, and after releases to him and "his heirs, this is an absolute discontinuance; because "the fee-simple is executed in the life of the tenant in "tail." It is apprehended, that these doctrines of *Littleton* and *Coke* must be allowed to be incontrovertible. Their applicability to the present case, so as to make the fine by *Richard Rowe* the son an enlargement of his pre-existing qualified and terminable reversion in fee expectant on his illegal lease for life to his mother, into a reversion in fee absolute, and so also as to make the subsequent expiration of such lease for life in his lifetime the cause of executing the so enlarged reversion in fee and of bringing it into actual possession, will, it is submitted, be found irresistible. *Littleton*, indeed, in his case mentions the grant of the reversion in fee by deed of the discontinuing tenant in tail, and represents it to be followed by attorn-

attornment of the lessee for life; and whether in the present case the grant of the reversion was by fine of the discontinuing tenant in tail *Richard Rowe* the son, and attornment by his mother the lessee for life to the conusee of the fine, is not mentioned. But it cannot be said, that a fine is a less efficient mode of granting a reversion in fee than a grant by deed: and as to attornment, the *Irish* act of 6 *Ann.* chap. 16., like the *English* act of the 4th of same reign, c. 16., s. 9. makes all grants or conveyances by fine or otherwise of the reversion or remainder of any lands good, without any attornment of the tenants upon whose particular estates such reversion or remainder shall be expectant. Nor can it be attempted to shew, that the application of the doctrines thus extracted from *Littleton* and *Coke* can be prevented, because they put the case of an estate-tail, with remainders in fee to devisees of the donor; for, with reference to the effect of discontinuance by a tenant in tail in devesting, how can it be said that a remainder in fee is more privileged from such an effect than a reversion in fee? Nor can any advantage be shewn to arise to the Defendant in error from the circumstance, that under the statutes of fines in 4 *Hen.* 7. c. 24. and 32 *Hen.* 8. c. 36. the fine of *Richard Rowe* the son would have been an absolute bar to his issue, if he had ever had any; the discontinuance to the remainder in fee to his sisters being the same, as it was in *Littleton*'s time; and the fines having become more operative against the issue in tail in such a case being no reason, why it should take away any part of the effect of the discontinuance on those in the remainder in fee.

The Plaintiff in error therefore submits, that the remainder in fee, which is the title of the lessors of the Defendant in error, was discontinued at the death of *Richard Rowe* the son; and that, this being so, those entitled to such remainder in fee had lost the right of entry, and

1805.

ROWE v. POWER.

were only remediable by bringing a writ of *formedon* in remainder; which indeed now could not be brought with effect, more than twenty years, being the limitation for *formedons* by the statute of limitations of 21st *James* the First, having elapsed since the death and failure of issue of *Richard Rowe* the son; but which, if still applicable, could be of no use to the Defendant in error in the present case, whose title is of course unsustainable without a right of entry in his lessors. These doctrines were stated and judicially acted upon by the Court of King's Bench in the 4th of *Charles* the First, in the famous case of *Sawle* or *Salvin* against *Clerke*, which case is learnedly reported by Sir *Wm. Jones*, 208. and *Croke Car.* 156. and appears to have been often argued and to have been nine years depending; and though, in the elaborate and profound argument of Lord Chief Justice *Vaughan* in *Boll* and *Horton*, *Vaugh.* 360. he controverts some parts of the reasoning of the Judges in *Salvin* and *Clerke*, it is not, because they held the remainder in fee in that case devested by the lease for life and the subsequent fine: but it is because they went the length of holding the fine with warranty an absolute bar to the party entitled to the remainder upon the doctrine of collateral warranty, which at that time was a bar without assets; and because he saw the lease for life as warranted by the 32d of *Henry* Eighth, though mistakenly as it seems, both from Judge *Croke*'s and from Sir *Wm. Jones*'s report, which latter, however, was not printed till the year after Lord *Vaughan*'s death.

It may perhaps be attempted to insist, that the point of devestment now made is in a form different from that expressed in the bill of exceptions; there the fine being urged as a bar, with the addition of their not having been an actual entry within five years after the death of *Richard Rowe* the son; whereas in the form now presented

sented the bar insisted upon is, that the fine is a bar without aid from the non-entry within the five years. But this only shews, that when the bill of exceptions was under consideration, it was deemed material to the Plaintiff in error to shape the bill of exceptions with scope large enough to embrace benefit of non-entry within the five years, if the case should finally require it.

2dly. The Plaintiff in error humbly submits, that though the point on the bill of exceptions should be decided against him, it will be impossible to uphold the judgment against which he appeals. It is not only apparent upon the bill of exceptions, that the claim of the lessors of the defendant in error is only to an undivided third; but their title is confessedly to no greater extent.

Two objections arise on this record; 1st, The declaration first contains two distinct demises to the Defendant in error by two distinct lessors of two distinct undivided thirds of the described lands of two distinct terms of years. Then the declaration goes on, by alleging, that by virtue of the demises he the Defendant in error entered into the lands and tenements, and was possessed thereof; and that, the Defendant in error being so possessed, the Plaintiff in error entered upon the premises, and him the Defendant in error ejected from his farm aforesaid. Upon this declaration, and the plea of not guilty, and issue joined, the jury, by their verdict, find the Plaintiff in error guilty of "the trespass and ejectment aforesaid;" and the judgment is, that the Defendant in error do recover against the Plaintiff in error his said terms yet to come in the lands and tenements aforesaid in the declaration specified. Now on behalf of the Plaintiff in error, it is submitted, whether, in strict letter at least, this is not producing a case, in which, on a title under two several demises of two several undivided thirds of the lands described,

1805.

ROWE v. POWER.

scribed, the declaration becomes gradually for the entirety, and the judgment is for the entirety also: and whether in that view there is not an incongruity in the different parts of the declaration, and at the same time an excess in the judgment. 2dly, The judgment is at least for recovery of two undivided thirds, under a title explained by the facts disclosed by the bill of exceptions even in the parts stating the proofs for the Defendant in error, to be only for one undivided third, and confessed to be in fact to no greater extent. This excess in judgment is on the face of the record: for, the declaration, as has been already explained, contains two separate demises of two several undivided thirds by two several lessors to the Defendant in error for two several terms of years, and the judgment is, that the Defendant in error shall recover his said terms, though the intermediate bill of exceptions proves the title of the lessors of the Defendant in error on their own shewing to be only to one third on the whole: to maintain such a judgment will be to take from the Plaintiff in error two undivided thirds on a title apparently and confessedly confined to one undivided third. It may, indeed, be attempted to support this excessive inconsistency of the judgment with the premises upon which it is founded, by insisting, that it will bear being construed a judgment for one undivided third; or by offering to wave the judgment for one of the undivided thirds. Against both these methods the Plaintiff in error protests. Against saving the judgment by construing it a judgment for one undivided third only, because the judgment will not bear such a construction; and if it could be so frittered, would be void for uncertainty, it being impossible to fix, to which of the undivided thirds the verdict, upon which the judgment is given, should be applied; against permitting the Defendant in error to wave his judgment for one undivided third, because such an essential departure

ture from the effect of the judgment should not be adopted to extricate it from the errors he has assigned.

This case was signed by

S. SHEPHERD.
V. GIBBS.
F. HARGRAVE.
C. ABBOTT.

The Defendant in error hoped the judgment would be affirmed for the following, amongst other Reasons.

Upon this record the single point for decision is, whether the Court of Exchequer did right in refusing to direct the jury upon the trial at bar, that the fine and non-claim offered in evidence were a conclusive bar to the Plaintiff's title. This is the single point made by the bill of exceptions, the very nature of which is not to draw the whole matter into examination again, but only some single point. *Bull. N. P.* 316. *Show. Parl. Cas.* 120. In respect to strangers, there are only two possible ways in which a fine can operate: first, either in point of conveyance, as passing whatever interest the party can lawfully pass; or, secondly, as creating a bar by force of non-claim. These are the only possible modes by which a fine can operate in respect to strangers; for its operation as an estoppel is confined merely to parties and privies, and its effect in barring the issue in tail stands merely on the same footing, they having been construed as privies under 4 *Hen.* 7. and since then barred by the express provision of 32 *Hen.* 8. It must be admitted in the present case, that in point of interest *Richard Rowe* the younger had nothing more to convey during the life of the dowress, as to the third of which she was in possession, than a remainder in tail male, which as against his own issue in tail was enlarged by the fine into a base fee determinable on failure of such issue; but in respect to the remainder over in fee, his fine, so far as it was to be considered as a fine passing an

1805.

ROWE v. POWER.

interest, could operate nothing; that remainder in fee it was not in his power to pass; the only way in which his fine could have any operation in respect to it, must therefore be as creating a bar by force of the subsequent non-claim. But it is submitted, that there are two grounds on which it can be shewn that the fine cannot operate as a bar by non-claim to this remainder in fee; 1st, because the fine in respect to this third, which the lessor of Plaintiff claims, is within the exception "*quod partes finis nil habuere;*" 2d, because the remainder in fee, as to this third, was not divested either before or at the time of the fine levied, nor by the operation of the fine itself.

As to the first point, it is to be observed that this is a fine *sur conuzance de droit come ceo*, &c. which always imports possession in one of the parties; this is to be inferred from the very terms of the conusance, "*come ceo qui'l a de son done.*" It imports an estate in possession, which must be at the least an estate of freehold, as a fine partaking of the nature of a real action could not be levied of a chattel interest, and there are other species of fine for passing freehold interests in remainder or reversion; a party therefore insisting upon a fine *sur conuzance de droit come ceo*, &c. with non-claim, as a bar to a stranger, is bound, in answer to the exception "*quod partes finis nil habuere,*" to shew that either of the parties had such an estate as the fine imports, and such an estate as could qualify him to levy a fine of that description; that is, at the least an estate of freehold in possession. It is the very issue knit by the express terms of the plea, "*Quod partes finis nil habuere ut de libero tenemento.*" *Co. Ent.* 632. *a.* So since the statutes of Pernor of Profits (*a*) the entry has always been "*Quod partes finis nil habuere nec in possessione nec in usu,*" and the pleading goes on, "*Sed quidam* A. B. *fuit seizitus tempore finis.*" So it is distinctly laid down, that the party is estopped from shewing he only passed a reversionary interest upon a fine of this sort. 1 *Roll. Abr.* 855.

(*a*) 1 *R.* 2. *c.* 9. 4 *H.* 4. *c.* 7. 11 *H.* 6. *c.* 4. 1 *H.* 7. *c.* 1.

(I),

1805.

ROWE v. POWER.

(I), *pl.* 9. *tit.* Estate, *Garret* v. *Blizard*, and S. P. *Year Book*, 41 *Ed.* 3. 14. the fine importing a possession. And upon a later occasion it was delivered as the opinion of the twelve Judges by Lord Chief Justice *Willes*, (3 *Atk.* 140.) upon the authority of Lord *Holt*, 1 *Salk.* 340. and Lord *Macclesfield*, 1 *P. Wms.* 519. that a fine of this description, unless where the party to it has at the least an estate of freehold in possession, has no effect as to making a title against strangers by force of non-claim. And this is the reason why in pleading a fine *sur conuzance de droit come ceo*, it is not necessary to allege seisin in either of the parties, but merely "*quod quidam finis sese levavit*," because this sort of fine imports it. 2 *Lutw.* 1622.; and if there be any actual seisin, it will enable the fine to operate in a course of time as a bar by non-claim, though in point of interest the conuzor might have had but an estate for life; but if there be not any actual estate of freehold, a stranger is at liberty to shew that upon the plea "*quod partes finis nil*," and by so doing shall void the fine; whereas in pleading any other sort of fine which does not import to pass both the fee and freehold, but only some particular interest, it is necessary to allege what that interest is according to the well-known rule, that in pleading, the commencement of particular estates must be shewn. It appearing therefore in this case, that neither the conuzor nor conuzee at the time of this fine had even an estate of freehold in possession in this third, of which the dowress was seised, it is open to the Defendant in error to avail himself of the exception "*quod partes finis nil habuere*," and so to avoid the operation of the fine.

It is also submitted, that on the second ground before mentioned this fine cannot operate as a bar to the lessor of the Plaintiff. It is a general rule, that no fine or warranty shall bar any estate in possession, reversion, or remainder, which is not divested or put to a right before or at the time of the fine, or by the operation of the fine itself. *Margaret Podger's*

1805.

ROWE v. POWER.

Podger's case, 9 *Co.* 106. 10 *Co.* 96. 2 *Inst.* 517. *Hardres*, 400. *Goodright ex dem. Hare* v. *Jones*, *Mich.* 23 G. 3., reported in *Cruize on Fines*, 292. *3d edit.* This is a most reasonable rule, for a party not put out of possession has all that entry or claim could give him, and it would therefore be absurd to require either in such a case. Indeed this construction of the statute of fines was probably made in analogy to the wise rule of the common law, according to which a fine did not begin to operate by the non-claim until a transmutation of possession had taken place, this being esteemed but reasonable notice to those who were to be affected by it. 1 *Co.* 96. *b.* 97. *a.* Before, and at the time of the fine levied in this case, the widow was seised and possessed of the one-third in dispute, and continued so seised and possessed during the whole of her life, as appears fully admitted in the case; and whilst she continued in undisturbed possession of this third, it cannot be pretended that the fine had any effect upon her estate; from whence it follows, that neither could the remainder in fee of this third, which depended in privity on her estate, be affected by the fine. Thus in a case put in *Knight* v. *Grenville*, *Skin.* 262. *A.* lessee for ninety-nine years, remainder to *B.* for life, remainder to *C.* in fee; *B.* levies a fine, and ruled that *A.* continuing in possession in privity of estate amounted to a continual claim by *C.*, and so *C.* not barred. And the same reasoning is to be found in *Focus* v. *Salisbury*, by Lord Chief Justice *Hale*, *Hardres*, 400. So in *Co. Lit.* 324. *b.* donor or lessor cannot be put out of their reversion, unless donee or lessee put out of their possession. Had the estate of the dowress been divested by an actual disseisin or otherwise, and a fine levied by the disseisor, her entry to revest her own estate, and avoid the fine, would have avoided it for those in remainder. 9 *Co.* 106. 2 *Inst.* 518. *Plow.* 359. 373. In like manner, a continual claim by the particular tenant will serve those in remainder.

der. *Lit. sect.* 416. Much more must it follow, that the continuance of her estate in this third undivested was the continuance of the remainder undivested, and of course that it cannot be barred by the fine, according to the rule; nor could the fine of itself divest the remainder; for as to this third, the conuzor had but an estate tail in remainder during the life of dowress, which lying in grant no conveyance of it even by fine could divest any estate. *Lit. sect.* 618. and *Co. Lit.* 332. *b.* It was objected below on the part of the Defendant, and attempted to be given as an answer to this part of the case, that the remainder in fee was divested and turned to a right at the time of the fine levied, for that the deed executed by *Richard Rowe* to the widow, on the 18th of *November*, 1724, could not be taken as an assignment of dower, but as a feoffment, which being perfected by livery of seisin by tenant in tail in possession, operated as a discontinuance of the estate tail, and the remainder depending thereon; and so it was said, that the tenant in tail being seised of a tortious reversion in fee at the time of the fine, the title of the Plaintiff was barred by non-claim. The grounds on which it was contended that this deed of *November* 1724 could not operate as an assignment of dower, were chiefly the following:—1st. Because it gave the widow a different quality of estate from what the law would have given her; her title it was said was to a divided third, whereas this deed gave her an undivided third, not having assigned it by metes and bounds.—2d. That livery of seisin was given, which in a proper assignment of dower is unnecessary.—3d. That conditions were annexed.—4th. That though as between the parties this might be taken as an assignment of dower, yet it was said third persons were not bound to admit it to be so.—In answer to these objections, it is submitted that such construction should always be made upon deeds as will best uphold the intent of the parties. Thus deeds, even purporting

1805.

ROWE v. POWER.

porting to operate in one form of conveyance, have been held to operate in another to effectuate the intent. 1 *P. Wms.* 162. *Tomlinson* v. *Dighton.* Because the primary intent must always be to pass the estate or interest, and not the particular mode of passing it. In the present case it is most fully and emphatically declared to have been the intent of the parties to that deed, that by virtue of it the widow should be immediately and thenceforth in the seisin and possession of one-third of the lands in question as effectually and indefeasibly as if under a proceeding in a writ of dower; and it is very remarkable that the deed does not affect to grant or convey any estate, or limit any particular quantity of interest, as it would have done if it was meant to operate as a substantive conveyance; but merely gives, grants, and assigns the full, quiet, and peaceable possession of one-third of all the lands, *&c.*; and therefore is in effect only an acknowledgment or ascertainment of her title of dower, and putting her into possession under that title. To construe this deed as conveying any new estates to the dowress, carved out of the estate tail of her son, would necessarily have made such estate defeasible, contrary to the manifest and leading intent of all the parties, "that she should be in possession as indefeasibly as if by writ of dower;" nor is it by any means necessary that dower should in all cases be assigned by metes and bounds; it is only necessary when done by the sheriff under an *hab. facias seizinam;* but the heir and dowress may agree to hold in common; for the assignment by metes and bounds being only for their mutual convenience, and to prevent disputes, they may agree to wave it, and so it was solemnly decided in *Coots* v. *Lambert,* 1 *Roll. Abr.* 682. title *Dower,* 10. *pl.* 3. and S. C. *Styles,* 276. by the name of *Booth* v. *Lambert;* and the same distinction is taken in a manuscript case cited from Lord Chief Justice *Hale,* Note 196 to edit. 13. *Co. Lit.* 32. *b.*, which indeed seems the

the same case; and also Note 34. *b.* It appears also from these authorities that such an assignment binds third persons, and the reason why it does so is, because the law entrusting the heir or devisee, or other person in possession of the freehold with the assignment of dower, it will presume that it is properly assigned till some person grieved sets it right by writ of admeasurement or other process, impeaching it *ex directo.* The passage in *Co. Lit.* 34. *b.*, in which it is said generally that dower should be assigned by metes and bounds, relates only to an assignment by the sheriff; and the case which Lord *Coke* cites from the Year-book, 45 *Ed.* 3. fol. 5. was plainly so, as the question arose there on a plea to a *sci. fa. qua. non execon.*

Nor can it be conceived that livery of seisin having been given, according to the intent of this deed (as it is expressly indorsed) can counteract that which was the main purpose of the deed, or that it can hurt when made by the heir or devisee, with agreement of the dowress, when in case of an adverse proceeding the law appoints the sheriff to do it. But however liable to objections in point of legal strictness this assignment of dower might be, it is submitted that the express and avowed intent of the deed in question being that the widow should be as effectually and indefeasibly seised and possessed of her dower, as if she had come in by writ of dower, the parties to that deed, and those deriving under them, are estopped from saying that it was any thing else than what it imported to be; and that therefore the Plaintiff in error, who has no other title but through, from, and under *Richard Rowe* the younger, the grantor in that deed, cannot now insist on any thing against the plain import and design thereof. It was also argued, on behalf of the Plaintiff in error, in the Court below, that even admitting the dower to have been well assigned by this deed, and that *Richard Rowe* the younger had only an estate-tail in remainder in this

1805.

ROWE v. POWER.

third during the life of the dowress, yet having passed that remainder by the fine, and it having become afterwards executed in possession during the life of tenant in tail, a discontinuance was thereby wrought, and they compared it to the case of *Salvin* v. *Clarke*, *Cro. Car.* 156. *Hunt* v. *Burn*, 3 *Res. Salk.* 245. *Co. Lit.* 333. *b.* and *Lit. sect.* 620.; and it was particularly insisted that the deed of *Nov.* 1724, conveying an estate to the widow for her life in this third, was equivalent to the lease for life mentioned in the beginning of *Lit. sect.* 620., and the subsequent fine of *Richard Rowe* to the grant of the reversion mentioned in the same section. But to these authorities it was answered, on the part of the Plaintiff, that in all these cases the estate had been discontinued by some act previous to the fine, and that in no one of them was it held that a fine levied by a remainder man in tail, though the remainder should come into possession in the life of the conuzor, had merely of itself the effect of making a discontinuance. In the case of *Salvin* v. *Clarke*, there had been a previous discontinuance by a lease not warranted by the statute; so too the case put in the 3d *Res.* of *Hunt* v. *Burn*, is expressly of an estate previously discontinued by another fine; and so expressly in the sec. 620 in *Lit.* and all the Commentaries on that section; and it is expressly laid down elsewhere in *Lit. sect.* 618. and *Co. Lit.* 332. *b.* that a remainder, whether in tail, or otherwise lying in grant, no conveyance of it by fine or otherwise merely of itself will discontinue or divest any estate; and, for the reason before given, it is submitted that there was no previous discontinuance in this case, and consequently that this case is very distinguishable from those cited.

These reasons were signed

W. ADAM.
FRANCIS DONALDSON.

This

This case was argued at the bar of the House by *Shepherd* Serjt. and *Gibbs* on the part of the Plaintiff in error, and by *Adam* and *Romilly* on the part of the Defendant in error. On the point respecting the entry of the judgment the cases of *Fisher* v *Hughes*, 2 *Str.* 908. and *Morris* v. *Barry*, 2 *Stra.* 1180. were referred to by the latter gentlemen as authorities in point.

On the 28th of *May* 1805, the last day on which the case was argued, the following questions were put to the Judges on the motion of the Lord Chancellor.

1st. Whether the fine of *Trinity* term 1730, mentioned in the bill of exceptions in this case with proclamations, there not having been an actual entry into the lands in the declaration mentioned made within five years after the death of *Richard Rowe* the younger, was a bar to the Plaintiff's title.

2d. Whether there is any error in the judgment in this, that *Richard Power* hath hereby recovered both the terms in the declaration mentioned.

The Judges having taken time to consider, their opinion was on this day delivered by

Sir JAMES MANSFIELD, Chief Justice of the Common Pleas.—This case of *Rowe* and *Power* comes here by writ of error to reverse a judgment given in favour of the Defendant in error by the Court of Exchequer in *Ireland*, and afterwards affirmed there by the Court of Exchequer Chamber. The case does not arise on a special verdict, but upon a bill of exceptions, the object of which is to bring in question the judgment of the Court below in a particular point. One question proposed by your Lordships to the Judges is, Whether the fine in *Trinity* term 1730, mentioned in the bill of exceptions in this case, there not having been an actual entry made within five years after the death of *Richard Rowe* the younger, was a bar to the Plaintiff's title? On the

17th

1805.

ROWE v. POWER.

17th *March* 1723 the testator made his will, by which he devised the lands in question to his only son *Richard Rowe* the younger, during the term of his natural life, and after his decease to the heirs of his body in tail; and for default of such heirs, to his three daughters and their heirs. In the bill of exceptions all other considerations are excluded, except the objection made that the fine is a bar; and this is the first point your Lordships require the opinion of the Judges upon. The case depends on the effect of the deed dated 18th *November* 1724, by which the son gave *Elizabeth Rowe* the widow one whole undivided third of the lands. It is admitted throughout the whole of the argument for the Plaintiff, that if this deed operates as an assignment of dower, the fine is no bar; and this is admitted, because in the case it is stated, that *Richard Rowe* who levied the fine had no seisin in the premises; he had no freehold in the land as to one third part which was given instead of dower by the assignment of the deed of 1724, if that be a good assignment. With regard to that one third, a fine could have no operation as against strangers, supposing it to be well assigned by way of dower; it could have no other effect than that of merely passing by way of grant the remainder. By statute the fine bars the issue in tail, and makes the estate descend as a fee so long as there is such issue; but this fine could not affect the precedent estate of the widow, if the assignment of her dower be good. If therefore the deed had the effect of an assignment of dower, there is an end of the bar. Against the deed of *November* 1724 operating as an assignment of dower, several objections are made, and in order to obviate those objections it is necessary to state the effect of the deed. (Here his Lordship read the material parts of the deed of the 18th *November* 1724, and of the indorsement thereon, attesting the delivery of the lands to *Elizabeth Rowe*, pursuant to the deed, and her entry thereon.) From the words of this

deed

1805.

ROWE v. POWER.

deed it sufficiently appears that it was the object and intention of the parties who executed it, that the widow should retain an undivided third of every species of estate according to the terms of the deed, and that she should not take an assignment of dower by metes and bounds. Indeed the intention of the persons who signed the deed is very little to be doubted, because Mrs. *Rowe* took possession according to the words of the deed. It is impossible to say that it was not the intention that this deed should operate as an assignment of dower. To this assignment of dower various objections are made. The principal one is, that dower cannot be assigned by law by giving an undivided third, but that it must be set out by metes and bounds; to this objection it may be answered, that *Coke* in his Commentary upon *Littleton* and other general writers upon this subject, where they deliver the same opinion, speak only of what the wife has a right to and may claim by law; but it is not said that a wife may not take her dower in another manner if she pleases; for though she has a right to have it distinguished by metes and bounds, yet she may wave that right, and take it in a different manner, as appears by the case mentioned in the printed report of *Coots* and *Lambert*, in *Style*, from which we may collect that assignment of dower may be made in a different way than by metes and bounds. That case was an assignment of dower by a tenant who was seised in fee of lands. It is objected to the authority of that case, that the person assigning dower was seised in fee, whereas in this case the person was only seised of an estate tail; but there is no weight in this objection; for as long as his estate and that of the dowress last, there is no reason why they should not between themselves agree to wave an assignment of dower by metes and bounds, and make a good assignment of dower of an undivided third part. Another objection which is made to this assignment of dower is, that the

1805.

ROWE v. POWER.

deed of the 18th of *November* 1724 was not followed by livery and seisin being given to the widow. It is a sufficient answer to this objection, that the want of livery is no objection to the assignment of dower; no livery is necessary; and Lord *Coke* in his Commentaries, p. 34. expressly says, "But there needeth neither livery of seisin nor writing to any assignment of dower, because it is due of common right." If therefore an assignment of dower may be made by metes and bounds without livery, there is no reason why an assignment of an undivided third may not be made in the same manner: but if it was necessary that livery of seisin should be made, there is no objection to the assignment of dower in this case. The objections made at the bar principally are, that it is contrary to the authority given to the attornies; which authority was, to deliver seisin of a third; whereas here the livery is made generally of all the land. The other objection is, that by the deed of 1724 it was intended to give a third of the estate to the widow in the same manner the law would have given it by metes and bounds. The answer is, that whatever might be the case if this livery and seisin did not refer to the deed, it will not signify in this case, there being an express reference to the deed, and to the uses and intention of the deed: notwithstanding the delivery of the whole of the lands, it must be necessarily confined to the manifest intention of the parties declared in the deed, that is to say, to one undivided third part of the estate; and the authorities in support of that are *Co. Litt.* 48. 222. *Perkins*, 189. A man seised of *Blackacre* and *Whitacre* makes a deed of feoffment of both, and a letter of attorney to enter into both acres, and to deliver seisin of both of them according to the form and effect of the deed, and he enters into *Blackacre* and delivers seisin *secundum formam chartæ;* this livery and seisin is good, albeit he did not enter into both, nor into one in name of both, for when he delivers seisin

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of one *secundum formam chartæ*, this is tantamount, and implies a livery of both. It is also laid down, that if an attorney does more than he is authorised by the command of his master to do, yet it shall be good with reference to that which he was commanded to do, and void for the rest. So here, if the attornies have done more than the commandment of their master authorises, yet they have executed their commands, and so far the livery is good. As to the other objection, that the livery and seisin is bad because the construction of the deed is, that the doweress is to have her estate in the same manner as if she was put in possession of it by law, and that therefore the livery ought to have been of one third part of the estate set out by metes and bounds, that is directly contrary to the plain meaning of the deed, as I have before stated; and all that is said only means that she should have as strong, as clear, and as valid a title as she would have had if she had recovered her dower by writ of dower; but it cannot possibly destroy the other part of the deed, which is calculated to give her an undivided third part of the premises. That objection, as well as the other I mentioned, appears to be perfectly void of all foundation, and falls to the ground. The Judges concur with me on the first point, that the fine does not operate as a bar. With regard to the second objection upon which our opinion is required, it is a curious one, and requires a good deal of pains to make it intelligible to any one who is not well acquainted with the forms and terms of law. This is a proceeding by ejectment by two supposed demises, both of which are perfect fictions, and known to every person within a month after he comes into *Westminster-hall* to be fictions merely, and therefore it is a proceeding to which an objection on mere form should receive little encouragement, and be as little countenanced as possible. It happens that an exception very similar was taken on error in a case in the Court of King's Bench, 2 *Stra.* 1180.

1805.

ROWE v. POWER.

which Court was of opinion, that the judgment of the Court of King's Bench in *Ireland* ought to be affirmed. In that case there were two demises alleged for the same term by two different persons of the same premises; the judgment was, that the Plaintiff should recover his terms: there were two terms for a certain number of years mentioned, one in each of the demises; the terms being the same, to expire the same moment; the objection was made before the Court of King's Bench in *England*, that it was impossible the Plaintiff could have a right to recover the two terms according to the words of the declaration, because if *A.* devise to a man an estate for 40 years, and then *B.* at the same moment devise the same estate to a man for 40 years, it is impossible both can have a right, one or other must have a right to it. The objection made to the Court of King's Bench was, that the judgment was inconsistent with itself, because it in effect said that both *A.* and *B.* were entitled to the estate. When the objection was made, the Court answered it as such an objection deserved to be answered; they said, (though what they said was not very likely to happen,) it might be *in rerum naturâ* that the estate might have belonged to two joint tenants, who might have refused to concur in one lease, but each might have made a lease of the whole, which would operate as a lease of the moiety. Upon that stretch of imagination the Court of King's Bench in *England* affirmed the judgment given in the Court in *Ireland*. In this case there is much clearer and stronger ground for affirming this judgment, notwithstanding the objections made to the word "terms." The unfortunate letter "s" is found added to the word term; but the ground upon which it is not necessary to yield to this objection is, that the whole of the evidence is not brought before your Lordships. This does not come before your Lordships by special verdict, but by bill of exceptions to set aside the judgment upon the operation of the fine: what other evi-

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dence was given besides that here stated does not appear; but it does appear by both the cases, and particularly by the case of the Plaintiff in Error, that there was a great deal of other evidence given, besides that which appears in the case, that is not brought before your Lordships: and for any thing that appears there might be a title to another undivided third of the estate devised under the Plaintiff in Error, *Ebenezer Radford Rowe:* and therefore upon the case, as it now stands on the second objection as well as the first, the learned Judges are of opinion that there is no Error.

Whereupon the Lord Chancellor moved, and it was resolved accordingly, that the judgment given in the Court of Exchequer-Chamber in *Ireland*, affirming the judgment of the Court of Exchequer in *Ireland*, be affirmed; and it was ordered that the record should be remitted (*a*).

(*a*) In *Shepherd*'s Touchstone, p. 28. *Anne Twist*'s case is referred to as a decided case, and which in principle is in direct opposition to the present decision. The passage is thus: "And if one seised of land in fee marry a wife, and after make a lease of this land to *A.* for life, the remainder to *B.* in fee, and *B.* levy a fine, with proclamations, and the husband die, and the wife do not make her claim, &c. within five years after the death of her husband, hereby she is barred of her dower for ever, notwithstanding the estate for life in *A.*, but if the remainder of *B.* had been put to a right at the time of the fine levied, she might have avoided the fine by plea, *quod partes finis nihil habuerunt*," &c. In the present case, the fine levied by *Richard Rowe* the younger during the life estate of his mother, in her one-third of the premises, the said *Richard Rowe* having the remainder in tail expectant upon the demise of his mother, which is similar to the fine levied by *B.* during the life of *A.* in *Ann Twist*'s case, was held not to operate upon that one-third against strangers. One of the learned Judges has kindly enabled the reporters to state that *Anne Twist*'s case was under their consideration in this case of *Rowe* v. *Power*. *Anne Twist*'s case is shortly stated in *Hobart*, 265. but without any judgment, and the pleadings are to be found in *Winch*'s Entries, p. 358. *et seq.*; but the Roll having been searched by direction of the Judges, no judgment appeared to have been entered. The learned author of the Touchstone was therefore probably mistaken in supposing any judgment to have been given in that case which he cites in support of his doctrine.

1805.

(IN THE HOUSE OF LORDS.)

July 11th.

FAIRFIELD (on the Demise of AMORY HAWKESWORTH and MARTHA his Wife, and of AMORY HAWKESWORTH and DANIEL PRENDERGAST) *v.* MORGAN; in Error.

A. being seised of lands, holden upon leases for lives, devised to *B.* his brother, all his real and freehold estates, subject to an annuity to his mother for her life, "but in case *B.* should die before he attained the age of 21 years, *or* without issue living at his death" to his mother for ever. *A.* died; *B.* attained the age of 21, and then died without issue. Held that the word "*or*" in the devise over must be construed as "and;" and that the mother took nothing upon the death of *B.*

THIS was an ejectment, brought in the Court of Common Pleas in *Ireland.*

Upon the trial of this cause, the jury found a special verdict, the substance of which was as follows: *Benjamin Smith* the elder, late of the city of *Dublin*, Esquire, deceased, was at his death seised of several messuages and plots of ground in the said city, which he held by several leases during the lives of the Prince of *Wales*, the Duke of *York*, and the Duke of *Clarence*, granted to him and his heirs, and renewable for ever, at certain reserved rents, amounting together to 196*l.* yearly, besides renewal fines; and which premises then produced an increase or profit rent of about 324*l.* a-year. The said *Benjamin Smith* died in *Dublin* intestate, leaving *Martha* (one of the lessors of the Plaintiff) his widow, and two sons, namely, *Nathaniel Nesbit Smith*, his eldest son and heir, and *Benjamin Smith*, then minors, and no other issue. On the decease of the said *B. Smith* the elder, the said *Nathaniel Nesbit Smith* entered upon his said father's freehold estates as heir at law, and held the same till his death. The said *Martha*, the widow of *Benjamin Smith* the elder, intermarried with *Amory Hawkesworth* Esquire, one of the lessors of the Plaintiff. The said *Nathaniel Nesbit Smith* departed this life on the 20th of *March* 1792, having on that very day made and duly executed his last will and testament, in the words following:—"In the name of God. Amen. I, *Nathaniel Nesbit Smith* of the city of *Dublin*,

1805.

FAIRFIELD v. MORGAN.

Dublin, do make and publish this my last will and testament. First, I will that all my just debts and funeral expences shall be paid by my executors hereinafter named. And as to my real and personal estates, I dispose thereof in the following manner, that is to say, I give, devise, and bequeath unto my brother *Benjamin Smith* all my real and freehold estates, subject to an annuity of 50*l. per annum*, which I will, bequeath, and devise to my honoured and much esteemed mother, *Martha Hawkesworth*, and which annuity I will and direct shall be paid to her during her life out of the rents and profits of my said real estates, to and for her own sole and separate use, and that her receipt alone under her hand shall be a sufficient discharge for the same. But in case my brother *Benjamin Smith should die before he attains the age of twenty-one years, or without issue living at his death*; I give, devise, and bequeath my said real estates to my mother for ever. I give and bequeath all my plate, jewels, watches, bonds, debts, arrears of rent, and all my other personal property, which I may die possessed of, or entitled unto, to my said brother *Benjamin Smith*; and after his death to my mother *Martha Hawkesworth*. And my will further is, that if the said annuity be in arrear for one month after the same shall be due and payable, it shall be lawful for the said *Martha* as to any part of my said real estates to enter and distrain the same. And I do hereby constitute and appoint my said brother *Benjamin* and my said mother executors of this my will. In witness whereof I have hereunto set my hand and seal this 20th day of *March* 1792." The said *Benjamin Smith*, on the 28th of *June* 1793, attained his age of twenty-one years, and by indentures of lease and release, dated respectively the 1st and 2d days of *July* 1794, conveyed the said premises to *John Rainsford* and his heirs, for certain trusts and purposes. By indentures of lease and release the said *Benjamin Smith* and *John Rainsford*, in consideration of the

1805.

FAIRFIELD v. MORGAN.

sum of 2812*l.* conveyed the said premises to the said Defendant *William Ford Morgan* and his heirs, subject to the said several yearly rents and renewals, fines and covenants, and also to the payment of the said annuity of fifty pounds to the said *Martha Hawkesworth* during her life. The said *Benjamin Smith*, on the 2d of *February* 1795, died intestate, unmarried, and without issue.

After argument in the Court of Common Pleas in *Ireland*, judgment was unanimously given for the Defendant.

To reverse this judgment, a writ of error was brought in the Court of King's Bench in *Ireland*, where the judgment of the Court of Common Pleas was affirmed against the opinion of one judge.

And to reverse these judgments of the Courts of Common Pleas and King's Bench in *Ireland*, a writ of error was brought in the House of Lords.

The substance of the reasons for which the Plaintiff in error prayed that the judgments might be reversed was as follows: This case depends upon the construction which ought to be given to that part of the will of *Nathaniel Nesbit Smith*, which devises his real and freehold estates to his younger brother *Benjamin Smith*; but in case *Benjamin* should die before he attains twenty-one, or without issue living at his death, to his mother, Mrs. *Hawkesworth*, for ever; *Benjamin Smith* having died without issue after attaining twenty-one. On the part of the lessors of the Plaintiff, the construction contended for is, that the devise over to Mrs. *Hawkesworth* is made to take effect upon either of two contingencies, that is, either in the event of her son *Benjamin*'s dying under twenty-one, which did not happen, or in the event of his dying without issue living at his death, which did happen, and consequently, that the happening of the latter contingency is sufficient to entitle Mrs. *Hawkesworth* to the leasehold for lives in question. On the part of the Defendant

fendant in error who derives as a purchaser from the testator's brother, *Benjamin Smith*, the construction insisted upon is, that the devise over to Mrs. *Hawkesworth* is upon one contingency, consisting of two branches, namely, the contingency of her son *Benjamin*'s dying under twenty-one, and without leaving issue; and that in this view, the latter part of the contingency having happened, and the former branch being now impossible, the devise over to Mrs. *Hawkesworth* cannot operate. The question therefore between the parties is, which of the two constructions should be adopted.

The construction contended for by the Defendant is directly contrary to the language of the testator; who by the use of the word "or" has made two contingencies, whereas the Defendant's construction, by substituting "and" for "or," consolidates them into one.—It may be admitted, that there are cases, especially on wills, where it is the duty of the Courts to change and reject the words of a written instrument. But it is a settled rule never to deviate from the proper sense of words where the language is unambiguous, unless it can be collected from the instrument itself, or the subject, that they were intended to be used in a different sense. Here the words are unequivocal, nor is there any thing to be found in the language of the testator, to shew that he did not mean to use them in their proper sense. Then is there any thing in the nature of the devise itself to require the rejection of disjunctive language? Nothing can be more common than the contingency which gives the estate to the mother on the death of the brother, without issue living at his death. Nor is there any absurdity in limiting two freehold leases to a mother in case of a brother dying an infant, though the effect of such a limitation might be to exclude the issue of the brother in case of his marrying under age. It is very common to postpone the vesting of the fortunes of younger children till 21, both in settlements and wills.

1805.

FAIRFIELD v. MORGAN.

wills. There is nothing unreasonable in supposing that the testator meant to discourage his brother from marrying before 21. If the first part of the contingency stood alone, it would exclude the wife or issue of the devisee in case of his dying under 21, and why should the addition of another contingency in favour of the mother, render both less favourable than if there had been only one? The event of the brother dying under 21, leaving issue, was much too remote a possibility to justify an alteration of the testator's expressions to the prejudice of the mother. For at the date of the will, the brother wanted but 15 months of 21, and was unmarried. And indeed, in case of the brother so dying under 21, and leaving issue, it is not impossible that the testator should intend to give the estate to their grandmother, whom the testator distinguishes with an epithet of affection, to whom he devises over the estate for ever, to whom the issue of his brother would be inheritable, and from whom they would, in all probability, finally receive the estate. There are indeed several cases, to the number of nine, which will probably be relied upon for the Defendant. These are *Baldwin* v. *Cock*, or *Truepennie*'s case, 1 *And.* 161. *Mo.* 239. *Owen*, 52. 1 *Leon.* 74. and *Gouldsb.* 71. also stated *Co. Litt.* 225. *a. Cro. Eliz.* 270. 1 *Rol. Rep.* 310. and 2 *Brownl.* 292. *Lord Mordaunt*, v. *Vaux*, 1 *Leo.* 243. *Cro. Eliz.* 269. and noticed *Co. Litt.* 225. *Soulle* v. *Gerrard*, *Cro. Eliz.* 525. *Moore*, 422. and *Noy*, 64. *Price* v. *Hunt*, *Pollexf.* 645. *Barker* v. *Suretees*, 2 *Stra.* 1175. *Walsh* v. *Peterson*, 3 *Atk.* 193. 9 *Mod.* 444. edit. by *Leach*. *Framlingham* v. *Brand*, 3 *Atk.* 390. 1 *Wils.* 140. *Brownsword* v. *Edwards*, 2 *Ves.* 243., and *Wright* d. *Burrell* v. *Kemp*, 3 *Term Rep.* 470. In these cases a disjunctive has been construed a conjunctive, *& vice versâ*, in order to correct an apparent blunder, and to make sense of what would otherwise be absurd, as in *Chapman* v. *Dalton*, *Plowd.* 289. and other cases there put.

1805.

FAIRFIELD v. MORGAN.

put. In *Baldwin* v. *Cock*, where a lease was made to a man and woman on their marriage for 21 years if "*he and she or any child or children*" between them should so long live, it was determined upon the death of the wife the lease survived to the husband. But the case furnished special grounds for so doing. The lease being in effect to husband and wife in joint tenancy, it was according to the doctrine in *Brudnell*'s case, 5 *Co.* 9. equivalent to a lease to them and the survivor, and shewed an intent that the survivor should take; and as the words concluded disjunctively with respect to the children, there was the better ground for adopting a disjunctive construction in the former part. It appears from the expressions both of *Coke* and *Anderson*, that these were the reasons which influenced the Court. The same reasoning applies to Lord *Mordaunt* v. *Vaux*.. There it having been declared that a fine should enure to the use of the daughters till the son returned from beyond sea, *and* came to his full age, *or* died, which of the said times, days, or hours came first, it was adjudged that the use in favour of the daughters determined either on the son's return, or attaining 21, as well as dying. The reason was, that the "or" at the end of the limitation controlled the "and" at the beginning; and indeed the words "which of the said times, days, or hours came first," almost excluded a different construction. The authority of most importance to the Defendant is *Soulle* v. *Gerrard*. According to the report in *Moore*, the words were, "If he die without issue *or* before his age of 21 years;" that being a devise upon the death of the first taker without issue generally, would be considered as an estate tail, and the limitation over being considered as a remainder might be deemed a sufficient reason for construing the words conjunctively. This construction therefore was merely consequential: and the report in *Noy* simply represents it as the essence of the case, that a devise to *A*, and his heirs,

1805.

FAIRFIELD v. MORGAN.

and if he die without issue to three others, is an estate tail: without taking any notice of the consequential construction of the disjunctive word "or." According to the report in *Cro. Eliz.* the words were "to *R.* and his heirs for ever; and if *R.* died within the age of 21 years, *or* without issue, then equally among his three other sons." *R.* had issue *Mary*, and died within age. It was contended for *Mary*, 1st, that "or" should be construed "and;" 2dly, that the devise to the three sons was void, being after a fee. The answer to the first ground was, that to take *or* for *and* would be to construe the intent against the direct word of the devise *or*, which never could be. The whole Court held, that the devise over, so far as it was on his dying within age, was void, being after a fee; but they thought that the word issue was explanatory of the word heirs, and gave to *R.* an estate tail. Neither *Anderson* C. J. nor *Beaumont* J. said any thing about construing "or" for "and;" and the other two Judges, *Walmesley* and *Owen* Js., only said, that if the remainder could have passed on the contingency of the first devisee dying within age, yet it ought not to commence until the dying without issue had also taken place. But in this *Walmesley* relied materially on the constructive estate tail, and also upon the word "then," which he thought applied to the latter contingency only; and was the same as if it had been "when the devisee shall die without issue." It appears therefore that the case entirely proceeded upon the rejection of the former contingency, that *Anderson* C. J. and *Beaumont* J. did not so much as advert to making disjunctive contingencies conjunctive, and that the two other Judges only adverted to it, under the supposition of their not rejecting a contingency which they did reject, and upon the ground of special words and intent, which in effect reduced the case before them to the simple contingency of the devisee dying without issue. In addition to this, the words of Lord *Holt* in *Helliard* v.

Jennings, 1 *Ld. Raym.* 505. may be referred to in answer to the argument, that the word "or" should be there construed "and," who said, "there is no necessity to construe 'or' as 'and' in this case; and the case of *Soulle* v. *Gerrard* was adjudged to be an estate tail; and it may be it was the father's design to restrain the marriage of his son before the age of 21 years." Lord *Raymond* adds, that the Court gave no positive opinion upon the point; the case having been adjourned at the importunity of the counsel for the son's devise. But the case at least shews the opinion of Lord *Holt*, that *Soulle* v. *Gerrard* was no judicial authority for a decision. The case of *Price* v. *Hunt* was a devise of lands and chattels to the testator's wife, till his son *John* should attain 14; and if she should die before that time, then to the son, his *heirs* and *assigns* for ever; and in case his son should die "before he should attain the age of 21 years, *or* have issue of his body lawfully begotten living," then, to the wife for life, and after her death to the testator's brother-in-law and his heirs. The mother having died after the son had attained 14, and before he had attained 21, and the son having afterwards attained that age, and died without issue, judgment was given for his heir against the devisee over. No reasons for this judgment are stated in the report, and only the argument of *Pollexfen* himself for the heir at law. On this case it may be observed, that the first devise expressly included the heirs of the devisee; that the first devisee was a son, and the devisee over only a brother-in-law; that the chattels as well as lands were included in the first devise, so that if the issue left by the son dying under 21 were to be preferred to the devisee over, they would take the whole property. But in the present case, the testator has expressly given the personal property to his mother after his brother's death, thereby giving her so far an entire preference to the issue of his brother; which renders it the more difficult to assume against

1805.

FAIRFIELD v. MORGAN.

against the testator's own words that he could not mean to give any limited preference as to the real estate. Nor are the words in *Price* v. *Hunt* so strongly disjunctive as here; the word "without" being omitted; for instead of "or without issue living at his decease," the words are, "or have issue living." And these words were still more exclusive of the devise over than in the present case; for if the son had issue born alive, the devisee over according to the letter would be excluded, though such issue should not have survived the son. The arguments of *Pollexfen* are very unsatisfactory. He first contends that a devise that *A. shall take* if *B.* die under 21, or without issue living, is the same as a devise that *A. shall not take* if *B.* attain 21, or have issue; thus converting an affirmative into a negative contingency. He then relies upon the sense of the testator, and argues, 1st, that if the latter words were construed, if he die before having issue *at any time*, the former branch of the contingency, if he die before 21, would be insignificant, being included in the other. 2dly, That a disjunctive construction might disinherit the issue of the devisee dying under 21; and, 3dly, that it might prevent his marrying under 21. To the first reason it may be answered, that dying under 21 is a great significant contingency, since it added to the failure of issue the contingency of dying under 21, whether with or without issue; to the two last that it is very common to discourage marriage, particularly of sons under 21, and for that purpose to prevent a transmissible interest vesting before that age. The authorities relied on were Lord *Mordaunt* v. *Vaux*, and *Soulle* v. *Gerrard*, which have already received an answer. The case of *Barker* v. *Suretees* was a devise to a grandson in fee, but if he died before 21 *or* marriage, *and* without issue, to a stranger. Here the first devise was in fee, the devisee over a stranger, and no part of the property was given to the devisee over whether the grandson died without issue or not.

not. But besides all this, the contingency itself was partly disjunctive and partly conjunctive, in which case it is said, *Co. Litt.* 225. that the construction must be throughout as the case may require. And indeed no other than a conjunctive construction could have been put upon these words, for the grandson could not die unmarried, and yet have lawful issue. And it may be added, that the words " then and in such case" in the singular, shew that one entire contingency only was contemplated. The case of *Walsh* v. *Peterson*, according to 9 *Mod.*, was a devise by a will in fee to the testator's son, and in case he should die before 21 *and* without leaving issue, then to his wife in fee. By a codicil reciting this devise, he devised that " in case his son should die before 21, *or* without issue *as aforesaid* to his wife for life, with remainders over." In the report in *Atkyns* the will is stated in the disjunctive as well as the codicil, but the report in 9 *Mod.* is the most full, and it appears from the argument of the Solicitor-General that the will was in the conjunctive. Lord *Hardwicke* held that a fee passed to the son, the devise being to him and his heirs; and that the word "and" in the will was not controlled by the word " or" in the codicil; that the words " as aforesaid" in the codicil qualified the disjunctive by reference to the conjunctive. His Lordship is indeed stated to have said incidentally, that where a devise is to *A. and his heirs*, and if he die under 21 *or* without issue, the *or* had been construed *and* to prevent the disinherison of the issue. But this was not the point in judgment, and if it were, it would not apply to this case, where the first devise is not in fee. The case of *Framlingham* v. *Brand*, according to the report in *Atkyns*, was a devise to *A.*, *his heirs and assigns for ever*; " and in case he shall happen to die in his minority *and* unmarried, *or* without issue," to *B.* in fee. According to *Wilson* it is *or* unmarried. If *Atkyns* (and his report is most full) be correct, then the devise was partly

1805.

FAIRFIELD v. MORGAN.

partly conjunctive and partly disjunctive. But supposing it to have been wholly disjunctive, still Lord *Hardwicke* appears to have proceeded upon the apparent intent that the devisee over should not take if *A.* attained 21, which might have been inferred from the first devise being to *A.* and his heirs. Besides, unless the will had been so construed, the words "dying without issue" would have been too general for an executory devise; whereas in the present case the words are confined to issue living at the decease of the first devisee. In *Brownsword* v. *Edwards* the devise was to trustees till *J. B.* should attain 21, *or* have issue, then to *J. B.* and the heirs of his body; but if *J. B.* should happen to die before 21, *and* without issue, then over. Lord *Hardwicke* thought that it was the intention of the testator to give an estate tail to *J. B.* when he should attain 21, or leave issue, and that the devises over from thenceforth operated as remainders, which till then operated as executory devises. But he did not profess to change a naked conjunctive into a disjunctive. His opinion proceeded upon the apparent intent which might be collected from the devise to *J. B.* and the heirs of his body. Indeed the contingency in the will was in the conjunctive, and Lord *Hardwicke*'s construction was for the conjunctive. The case of *Wright* d. *Burrell* v. *Kemp* was a surrender to the use of *W.* for life, remainder to the use of *the issue of his body*, but in case he should die in the lifetime of the surrenderor, *or* without issue of his body, then and thereupon the surrendered premises should go to the right heirs of the surrenderor for ever. The Court of K. B. construed the word "or" as "and" upon the ground of the clear intent of the surrenderor to prefer the issue of *W.* (his natural son) to his own right heirs, which might be inferred from the express remainder over to the issue, which they would not suffer to be revoked by an inaccurate expression in the introduction of the ultimate limitation. It was quite unaccountable, that after

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an express limitation to the son for life, with remainder to his issue, the testator should mean to exclude such issue, if the son should die in his lifetime. None of the nine cases therefore, warrant the construing a disjunctive contingency conjunctively without special evidence of intent. Yet the reasons for the judgments below were founded more upon the authority of these precedents than the reasonableness of the construction. The authorities for violating the language of the testator thus failing, it is not necessary to produce many to shew that his words ought not to be altered into the reverse of the sense which they import. The language of Lord *Holt* has already been adverted to. In *Woodward* v. *Glastrook*, 2 *Vern.* 388. Lord *Holt* acted upon the principles of his opinion in *Helliard* v. *Jennings*, and the Court of Chancery decreed accordingly. There the testator devised a house to his sons *J.* and *T.* and the heirs of their bodies in moieties, and other houses in like manner to his other children; but if any of his children should die before 21, *or* unmarried, his part should go to the survivors. Two of the sons having attained 21, and died unmarried, the Court of K. B. held that the clause of survivorship operated, and a partition was decreed in Chancery in conformity to this determination. And this case is particularly strong, on account of the previous limitation to the *heirs of the bodies* of the children. To this may be added *Chaman* d. *Oliver* v. *Brown*, 3 *Burr.* 1626. to shew the strong inclination of the Court against construing wills contrary to express provisions, except from necessity; where the will would otherwise be absurd or inconsistent. Lord *Mansfield* there said, "A Court of Justice may construe a will; and, from what is expressed, necessarily imply an intent not particularly specified in words. But we cannot from arbitrary conjecture, though founded on the highest degree of probability, add to a will or supply the omissions." Lord *Hardwicke*, though generally

1805.

FAIRFIELD v. MORGAN.

liberal in construing the intent of testators, would not supply a contingency omitted in the most favourable case that could exist. A mother devised her real and personal estate to her daughter, who was an only child, and if she died before she was of age to dispose thereof, then devised it over. The daughter lived to be married, and died, leaving a daughter, between 20 and 21. Lord *Hardwicke* decreed for the devisee over as to the real estate." The case referred to is *Bellasis* v. *Uthwatt* 1 *Atk.* 426. And *Wilmott* J. added, "How can we make wills, and insert words arbitrarily and by conjecture?" In *Hay* v. *Earl of Coventry*, 3 *Term Rep.* 85. where the question was, whether words of inheritance could be supplied in a limitation to daughters, the previous limitations to the sons being in tail, Lord *Kenyon* said, "The general rule which is laid down in the books, and on which alone Courts can with safety proceed in the decision of questions of this kind, is to collect the testator's intention from the words which he has used in his will, and not from conjecture. It is not necessary that any technical or artificial form of words should be used in a will; but we must collect the meaning of the testator from those words which he has used; and cannot add words which he has not used." The language of the Court in *Doe* v. *Perryn*, 3 *Term Rep.* 484. is equally strong against proceeding on conjecture. Lord *Kenyon* says, "There is no doubt that legal formal words may be controlled by the context of the will. But we ought not to reject the legal meaning of those words, unless we are clear that in so doing we give effect to the devisor's intention." And *Buller* J. says, "In this will the devisor has used the words 'heirs of the body, children and issue,' and having used them we are bound to say that he understood the meaning of each; and we cannot substitute one for the other, unless by unavoidable and necessary construction, in order to make sense of the will." In *Doe* d. *Davy* v. *Burnsall*, 6 *Term*

1805.

FAIRFIELD v. MORGAN.

6 *Term Rep.* 30. where, after a limitation to a woman and the issue of her body, as tenants in common, there was a devise over in default of such issue, or being such, if they should die under 21, *and* without issue, Lord *Kenyon* resisted any attempt to construe the clause disjunctively. He says, "There is no doubt but that a word of conjunction in a will has been construed in the disjunctive, and *vice versâ* a disjunctive word construed in the conjunctive, where it has been necessary to give effect to the devisor's intention. But unless there be something in the will, from which it is to be collected that the devisor did not use such words in the grammatical sense, the grammatical construction must prevail." The language of the will being expressly in the disjunctive, nothing but the most cogent evidence of a contrary intent can justify rejecting an express devise to the mother in the event of the brother's dying without issue living at his death; there is nothing in any part of the will to shew such an intent, and the possible prejudice to the issue is no proof of the testator's intent to give a transmissible interest to his brother before 21, when opposed to language expressly denying it. There is no case founded on this single ground of a possible prejudice to the issue; they have all proceeded upon circumstances forming no part of this case; and indeed no precedents could justify an interpretation so contrary to the general practice of the courts and the doctrine of all the cases as that contended for. Nothing but necessity, arising from the unaccountableness of the disposition, could justify such an interpretation. But, to repeat the words of Lord *Holt*, "there is no necessity to construe 'or' as 'and' in this case, and it may be it was the testator's design to restrain his younger brother's marriage before the age of 21." Besides he might wish to enlarge the devise to his mother, for whom he shewed a partiality. He might have been influenced by the common practice of postponing the

1805.

FAIRFIELD v. MORGAN.

vesting of portions and provisions of younger sons till they had attained 21. He might think that it would not appear extraordinary that a will which in favour of his mother gave only a life interest in his personal estate to his younger brother without transmissibility at any time, should deny transmissibility of a leasehold for lives till he attained that age at which provisions for younger sons are usually made transmissible, and he might not think any reason necessary to support such a devise. Be that as it may, such is the will, and it is not contrary to law, or reason, or common practice in settlements. It may be added that as the brother attained 21, and died a bachelor, neither wife nor issue can be affected, but only a person who purchased with his eyes open.

The reasons were signed,

THO. PLUMER.
FRAS. HARGRAVE.

The Defendant in error prayed that the judgments below might be affirmed, for the following, among other reasons:

First, The general intent of the testator, as far as it can be collected from his whole will, must prevail even against any particular clause, which, if taken separately, may have, or seem to have a contrary tendency. *Robinson* v. *Robinson*, 1 *Burr.* 38. *Doe* d. *Bean* v. *Halley*, 8 *Term Rep.* 5. Now in the present case, the general intent of the testator appears with sufficient clearness to have been to prefer his brother *Benjamin* and his issue before his mother; and that the mother was not to take to the exclusion of the children of *Benjamin*. This intent then ought to be carried into effect, and it cannot be carried into effect without construing the word "or" in a conjunctive sense; since otherwise *Benjamin* might have died under age leaving children, and by reason of his dying under age the children would have been excluded.

Secondly,

Secondly, To give to the word "or" a conjunctive sense, when the context and intent of the whole instrument require it, is neither a strained nor a novel construction. There is perhaps no word in the language of more equivocal effect than the word "or;" by a slight variation of the phrase in almost any case, it may be made to have either a conjunctive or disjunctive operation. A devise over, "*if A.* should die before attaining his full age or day of marriage" does not take effect by strict grammar, "if *A.* either comes to age or marries." But change the expression to, "if *A.* shall die before attaining his full age, or (before attaining his) day of marriage," then, in strict grammar, the devise over takes effect, unless both happen; yet the words between the parenthesis, which are used in the latter mode of expression, must be understood in the former, in order to make sense of the passage. The consequence is, that Courts have at all times paid little attention to a word, the effect of which depends on distinctions so small and subtle, and have construed the meaning in that way which seemed most conformable to sense, without much attention to the conjunctive or disjunctive meaning of the particle used. This has been done even in acts of parliament. *Fowler* v. *Padget*, 7 *Term Rep.* 509. In wills it is grown into a settled rule of construction, that where there is a devise of an inheritance to any person, and a devise over depending on his age or issue, whether these two events are connected by a conjunctive or disjunctive particle, the estate of the first taker is absolute, if either of the events takes place: and this for one plain reason, expressed or implied in all the cases, namely, that otherwise if the taker should die under age leaving issue, such issue would be disinherited. *Sowell* v. *Garratt*, *Moore*, 422. *Price* v. *Hunt*, *Pollexfen*, 645. *Barker* v. *Suretees*, 2 *Stra.* 1175. *Walsh* v. *Peterson*, 3 *Atk.* 193. S. C. 9 *Mod.* 444. *Framingham* v. *Brand*, 1 *Wilson*, 140. all in

1805.

FAIRFIELD v. MORGAN.

point; and *Wright ex d. Burrel* v. *Kemp*, 3 *Term Rep.* 470. where the same conjunctive sense was given to the word "or" used in a surrender of a copyhold.

V. GIBBS.

WILLM. ADAM.

This case was argued at the bar of the House by *Plumer* and *Hargrave* for the Plaintiffs in error, and *Adam* and *Park* for the Defendants in error, after which the following question was proposed to the Judges upon the motion of the Lord Chancellor:

Whether, upon the death of *Benjamin Smith* after he attained 21 years of age, but without issue living at his death, *Martha Hawkesworth*, the mother of the testator *Nathaniel Nesbitt Smith*, became by virtue of his will entitled to any estate in the several lands mentioned in the special verdict in this cause to have been granted to *Benjamin Smith* the elder, his heirs, and assigns, for the lives of the 1st, 2d, and 3d sons of His Majesty?

On this day the opinion of the Judges was delivered by

Sir JAMES MANSFIELD, Chief Justice of the Common Pleas. This is a writ of error upon a judgment of the Court of King's Bench in *Ireland*, affirming the judgment of the Court of Common Pleas in *Ireland*, and your Lordships have proposed a question for the opinion of the Judges. The case is shortly this; the testator *Nathaniel Nesbitt Smith* was the son of Mr. *Benjamin Smith* and his wife, now Mrs. *Hawkesworth*, and he had a brother named *Benjamin Smith:* he made his will, dated in *March* 1792, in these words: "First, I will that all my just debts and funeral expences shall be paid by my executors hereinafter named; and as to my real and personal estates I dispose thereof in the following manner, that is to say, I give, devise, and bequeath to my brother *Benjamin*

min Smith all my real and freehold estates, subject to an annuity of 50*l. per annum*, which I will, bequeath, and devise to my honoured and much esteemed mother *Martha Hawkesworth*, and which I will and direct shall be paid to her during her life out of the rents and profits of my said real estates to and for her own sole and separate use, and that her receipt alone under her hand shall be a sufficient discharge for the same; but in case my said brother *Benjamin Smith* shall die before he attains the age of 21, or without issue living after his death, I give, devise, and bequeath my said real estates to my said mother for ever." The events that took place after the death of the testator are these; his brother *Benjamin* took possession of the premises, and died after attaining the age of 21, without leaving any issue. It is contended on the part of the Plaintiff in error, that as *Benjamin Smith* lived to 21 years, but died without issue, and both the events did not happen of his living to 21 and leaving issue, he became entitled on account of the word "or." The words are, "but in case my said brother *Benjamin Smith* shall die before he attains the age of 21, *or* without issue living at his death, I give, devise, and bequeath my said real estates to my said mother for ever." The question therefore depends upon the effect of the word "or," whether it is to be taken disjunctively, or as if the conjunction "and" had been used. The estate is given to his mother in case his brother died before 21, *or* died without issue; if it was necessary for both these events to happen, of course she would only be entitled to it upon their happening. A great deal of ingenious argument has been employed to shew that this word "or" could not be construed as "and," so as to make it necessary that both the events should happen to entitle the widow; but on the other hand, in cases very similar a great number of instances were cited, in which the same word "or" has been determined to be used in a conjunctive sense, and so it must

1805.

FAIRFIELD v. MORGAN.

here in order to comply with the intention of the testator: and all the Judges concur in the opinion, that this is the true sense of the word "or" in this case, and that the judgment ought to be affirmed. The contrary construction of this will would make the devise as absurd as could be well imagined. The testator gives all his estates in the most general way to his brother *Benjamin*, by which he would take not a limited interest but the whole absolute interest. But this would be an estate for life if the word "or" were to be used disjunctively; and if it were to be so construed this consequence would follow, that *Benjamin* could never have had the real use of the property, though the testator gives it to him; he could neither have sold or mortgaged it, let his family have been ever so large: for unless he had had issue living at the time of his death, the mother would be entitled; so that he would never have had the absolute estate. Besides this, if a different event had happened from that which took place, if an event *vice versâ* had taken place, and *Benjamin* had had children, and had died a day before he obtained the age of 21, those children could not have taken or been at all benefited by the estate, but it must have gone over to the mother. The idea of a devisor giving an estate to a brother to enjoy it during the life of the mother, who was likely to die before her son, and to make a will to exclude the issue of his brother, is so absurd and improbable, that it is next to an impossibility to impute such an intention to him. Upon these grounds the Judges are of opinion, that this lady in the words of the question, upon the death of *Benjamin Smith* after the age of 21, without issue, did not become entitled to any estate mentioned in the special verdict in this case.

Judgment affirmed.

1805.

Nov. 6.

LOVIBOND *v.* Sir JOHN MORSHEAD Bart. *et Ux.*

The affidavit of acknowledgment of a fine made by one of the commissioners, in *France*, but not signed, appearing to be in the same hand-writing as his signature to the acknowledgment at the foot of the *præcipe*, and concord, and endorsement of the writ; and such affidavit having been taken and attested in *France* by two *English* magistrates on account of an exorbitant demand of per centage on the part of the *French* officer authorised to take affidavits; the Court allowed the fine to pass.

BAYLEY Serjt. moved that a fine levied in this case might be allowed to pass.

It appeared that the fine having been duly acknowledged in *England* by Lady *Morshead*, was sent to *Verdun* in *France* to be acknowledged by Sir *John Morshead*, who was a prisoner there, before two commissioners, *Richard Estwick* and *Thomas Letter*; that it having been accordingly acknowledged before them by Sir *John Morshead*, an affidavit of that fact was made by *Thomas Letter*, which affidavit however was not subscribed by *Thomas Letter*, but from the subscription of his name to the caption at the foot of the *præcipe* and concord, and indorsed upon the writ, it appeared that the name of *Thomas Letter* in the body of the affidavit was in his own hand-writing. In consequence of the president of the tribunal at *Verdun* (who was the only person there authorised to take an affidavit) having refused to administer the oath unless the sum of 4 livres 8 sous for every 100 livres of the value of the estate (of which the annual value was 2000*l.* sterling) were paid to the *French* government, two *English* magistrates then prisoners at *Verdun*, Mr. *Nicholls*, a justice of the peace for the county of *Oxford*, and Mr. *Clive*, a justice of the peace for the county of *Hereford*, administered the oath, and attested the affidavit in the following words: "The president of the tribunal of this place being the only magistrate authorised to take an oath, and refusing to receive an affidavit unless a per centage of 4 livres 8 sous upon each hundred livres upon the value of the estate is paid to the *French* government, we, two of his Majesty's justices of the peace, have thought proper to receive the within affidavit from *Thomas Letter*, one of the commissioners named for taking the acknowledgment of the fine from Sir *John Morshead* Baronet. (Signed) *John*

1805.

LOVIBOND v. MORSHEAD.

John Nicholls. E. B. Clive. Verdun sur meure. 2d *Sept.* 1805."

The Court being satisfied upon an examination of the hand-writing of the caption, indorsement, and affidavit, that the name of *Thomas Letter* mentioned in the letter was in his own hand-writing; and considering the demand made by the president of the tribunal of *Verdun* as too exorbitant to be complied with, allowed the fine to pass.

Nov. 8.

PEARSE *v.* PORKLINGTON.

Defendant having put off the trial at the assizes on the absence of a witness, the Court refused to let the Plaintiff change the venue to *Middlesex.*

IN this case, which was an action for making a false return of a writ, the venue having been laid in *Suffolk*, and the cause set down for trial at the last assizes for that county, the Defendant obtained an order for putting off the trial to the next assizes on account of the absence of a material witness.

Bayley Serjt. on the part of the Plaintiff now moved for leave to amend, by changing the venue from *Suffolk* to *Middlesex*, stating that the Plaintiff would be put to considerable inconvenience if the trial were to be postponed to the next assizes, and that by granting the application the Court would only place the Plaintiff in the same situation as he would have been in if he had originally laid the venue in *Middlesex*, since the Defendant could not have removed it, as many of the facts in an action for a false return must necessarily be proved in *Middlesex.*

But *the Court* thought, that after issue had once been joined, and the cause had been taken down to trial, it was too late to change the venue; and that if this motion were

were granted, a similar application would be made by the Plaintiff in every case where the Defendant had put off the trial at the assizes on account of the absence of a witness.

Bayley took nothing by his motion.

MARTIN *v.* SLADE.

Nov. 8.

In an action on 32 *Geo.* 2. *c.* 28. for penalties against a sheriff's officer for taking a larger fee upon an arrest than is allowed by law, the Plaintiff must prove the sum allowed by law, the stat. 23 *Hen.* 6. *c.* 9. not being the rule: And the Court will not set aside a nonsuit grounded on the want of such evidence, in order to enable the Plaintiff to recover the excess under the money counts, since he might have obtained redress by summary application.

THIS was an action against the Defendant, as a sheriff's officer, to recover penalties under the 32 *Geo.* 2. *c.* 28. The declaration contained several counts, one of which, the 8th, was for a penalty of 50*l.* for taking the sum of one guinea for arresting the Plaintiff by virtue of a writ out of the Court of King's Bench; to which the common money counts in debt were added.

At the trial before *Heath* J. at the summer assizes for the county of *Essex*, the Plaintiff proved the arrest, and that the Defendant demanded and received for the same the sum of one guinea, besides one guinea for the bail-bond, and that one guinea more was paid by the Plaintiff for supper. No proof however was given on the part of the Plaintiff of any table containing the allowance of a specific fee for an arrest; or of any other regulation respecting such fee by the officers of the Court of King's Bench; but on the part of the Defendant it was proved, that in the Court of Common Pleas the sum of one guinea was always allowed by the prothonotaries in the taxation of costs. The counsel for the Defendant, upon the authority of *Jaques* v. *Whitcomb*, 1 *Esp. N. P. Cas.* 361. contended, that as no table of fees had been proved, there was no evidence that more had been taken than the legal fee; and that the Plaintiff

1805.

MARTIN. v. SLADE.

tiff ought to be nonsuited; and the learned Judge being of this opinion, nonsuited the Plaintiff.

Best Serjt. now moved for a rule to shew cause why this nonsuit should not be set aside, and a new trial had; contending, first, that the table of fees referred to in the 12th sect. of the act did not apply to the case of an arrest, but related only to the acts of gaolers, or keepers of prisons, or other persons thereto belonging; and that the first sect. having directed generally, that no officer or minister should take more than was or should be allowed by law for any arrest; the amount of such fee was to be sought for in such regulation as had been made by act of parliament, and was limited by the 23 *H.* 6. *c.* 9.; and, secondly, that as it appeared in evidence that the Defendant had taken more than he was entitled to, the Plaintiff ought to have a new trial for the purpose of recovering the excess upon the money counts; and cited *Lovel* v. *Simpson*, 3 *Esp. N. P. Cas.*

The Court however were clearly of opinion, that the regulations of the statute of *H.* 6. could not now be considered as giving the rule for the amount of the fee to be taken, and that it was incumbent on the Plaintiff to give some evidence that more had been taken than by law was allowed. They further observed, that if the Defendant had extorted more than his due, the Plaintiff might make a summary application to the Court; and as the Plaintiff by proceeding for penalties had made a long record, and created a great unnecessary expence, it was but just that he should bear it; and therefore refused to interfere by setting aside the nonsuit.

Best took nothing by his motion.

1805.

Nov. 11.

WADDINGTON *v.* OLIVER.

One agreed to deliver 100 bags of hops at a certain price by a certain time, and having delivered part, commenced an action for the price thereof before the expiration of the time for the delivery of the remainder. Held that such action could not be maintained, the contract being entire.

THIS was an action for goods sold and delivered. At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Trinity* term, it appeared that on the 10th of *September* 1804, the Plaintiff agreed with the Defendant to sell him 100 bags of *Kent* hops, merchantable, of the growth of 1804, at 56*s. per* hundred weight, to be delivered on or before the 1st of *January* 1805, as it might be agreeable to the Plaintiff. That on the 12th of *December* twelve bags were delivered, and on the same day, or the next, payment thereof was demanded, which being refused, the writ was sued out on the 13th of *December*. His Lordship being of opinion that the Plaintiff, having agreed to deliver 100 bags of hops by a particular day, was not entitled to bring an action upon delivery of a part of the goods, nonsuited the Plaintiff.

Shepherd Serjt. now moved to set aside the nonsuit, and urged, that as the Plaintiff was at liberty to deliver the hops at such times as he pleased before the first of *January*, and no time was stipulated for payment, the Defendant was bound to pay for them as they were delivered.

The Court however was clearly of opinion, that the contract was entire and could not be split, and that the Plaintiff therefore had no right to bring an action until the whole quantity was delivered, or until the time for delivering the whole had arrived.

Shepherd took nothing by his motion.

1805.

Nov. 11.

MOUNTFORD and Another *v.* HORTON.

The first count of a declaration in *Assumpsit*, stating an agreement between two persons, omitted the mutual promises. On motion in arrest of judgment, held that the agreement imported a promise.

THE declaration stated, that the Defendant was attached to answer the Plaintiffs in a plea of trespass on the case; and the Plaintiffs complained, that before and at the time of making the promise and undertaking thereinafter next mentioned, divers quantities of timber were about to be sold by auction, of which as well the Defendant as the Plaintiffs had notice, and thereupon it was agreed by and between the Defendant and the Plaintiffs, that if the Plaintiffs should purchase any lots, and the Defendant should also purchase any other lots, that the Defendant should take to and have the timber, and that the Plaintiffs should have the bark of the oak trees, and that the Defendant should permit the Plaintiffs to peel and take away the said bark at a proper time; that the timber was sold, and that the Defendant purchased one lot and the Plaintiffs another lot; that in pursuance of the said agreement the Plaintiffs permitted the Defendant to take to and have, and the Defendant did in fact take to and have the lot purchased by the Plaintiffs; and although the Plaintiffs were always ready and willing to pay the Defendant for the bark of the oak trees of the said two lots, according to the said agreement, and to have peeled and taken away the said bark at a proper time, and applied to the Defendant to permit them so to do in pursuance of the said agreement, and tendered the price thereof, nevertheless the Defendant not regarding the said agreement in that behalf made as aforesaid, but contriving, &c. refused to permit the said Plaintiffs to peel or take away the said bark, whereby they lost great profit. The remaining counts of the declaration were upon promises of the Defendant; in all of which it was averred

in

in the usual form that he undertook and faithfully promised.—Plea, *Non assumpsit.*

Upon the trial of this cause a general verdict having been found for the Plaintiffs,

Bayley Serjt. now moved to arrest the judgment, contending that as no promise was averred in the first count, it could not be considered as a count in *assumpsit*, but must be taken to be a count in tort upon the agreement, which might have been joined with a count in trover; that the statement of the agreement did not of itself amount to an averment of a promise, for that in actions of debt it was common to aver that certain things were agreed, whereby an action had accrued; whereas if such averment of an agreement was equivalent to an averment of a promise, the declaration ought not to be in debt, but in *assumpsit.*

Sir J. MANSFIELD Ch. J. Is not an agreement a promise? An agreement to pay money is a promise to pay money, and the case of an agreement upon which debt is brought, is itself a promise.

The rest of the Court concurring,

Bayley took nothing by his motion (*a*).

(*a*) In the case of *Starkey* v. *Cheeseman*, 1 *Salk.* 128. where a similar objection was taken to a count on a bill of exchange, *Holt* Ch. J. held that the drawing of the bill was an actual promise; and in *Lowther* v. *Conyers*, cited 1 *Stra.* 224. the same doctrine was applied to a count on a promissory note, where the promise was omitted. Also in *Roe* v. *Gatehouse*, 2 *Salk.* 663, where the name of the Defendant was omitted in the averment of the promise in the second count, the Court held that the same nominative should go to all the promises, and therefore the declaration was well enough; but in *Buckler* v. *Angill*, 1 *Lev.* 164. where the declaration was, that in consideration that the Plaintiff would surrender a term, the Defendant *solvere vellet* 10*l.* without stating any promise, the Court held the declaration bad; and the same doctrine prevailed in the case of *Lee* v. *Welch*, 2 *Ld. Ray.* 1517. upon a similar declaration, and in *Law* v. *Saunders*, *Cro. Eliz.* 913. where the name of the Defendant was omitted in the statement of the promise, the declaration was held bad after verdict, there being no prior count by which the omission could be helped.

1805.

Nov. 14.

A carrier, who by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor.

BUTLER *v.* WOOLCOTT.

THIS was an action of trover brought to recover the value of a quantity of butter, which came on to be tried at the sittings after last *Hilary* term before Sir *James Mansfield* Ch. J., when a verdict was found for the Plaintiff for the sum of 17*l.* 12*s.* 6*d.*, subject to the opinion of the Court upon the following case:

The Plaintiff was a cheesemonger in *London*, and the Defendant the proprietor of a public waggon for the carriage and conveyance of goods from *Sherborne* in *Dorsetshire* to *London*. For some years previous to *June* 1803 the Plaintiff had dealt for butter with a person of the name of *John Ensor*, who was a butter factor and dealer in that commodity residing in *Sherborne*. *Ensor* generally sent butter every week to the Plaintiff in *London* by the Defendant's waggon, and the tubs and firkins were marked with the letter *B.* (the initial of the Plaintiff's surname). A bill of parcels or invoice was also usually sent by *Ensor* of the quantity, with a letter of advice to the Plaintiff, upon the production of which to the book-keeper or other persons employed by the Defendant to conduct the business of the waggon in *London*, the butter had always been delivered to the Plaintiff. Upon the butter being delivered to the Defendant's waggon at *Sherborne*, *Ensor* used to draw bills on the Plaintiff for the amount of the goods so sent, which bills were regularly honoured and paid by the Plaintiff. On the 15th of *June* 1803 *Ensor* sent up from *Sherborne* to the Plaintiff by the Defendant's waggon six firkins of butter, regularly invoiced, and marked with the letter *B.*; and on the 16th of the same month he sent a letter of advice, and the invoice or bill of parcels of the said butters to the Plaintiff by the post; and at the same time drew a bill according

to

to their usual and accustomed mode of dealing for 100*l.* at 30 days after date, which included in it the value of the six firkins of butter then sent. The bill was immediately accepted by the Plaintiff, and afterwards paid by him when it became due. The goods arrived safe in the Defendant's waggon in *London*, and the Plaintiff demanded the goods of the Defendant's agent or book-keeper, and produced the bill of parcels and letter of advice, and tendered the money for the carriage, and all other charges on the six firkins; but *Ensor* having become bankrupt before the goods arrived in *London*, and he being indebted to the Defendant in 55*l.* for the carriage of other butters to *London*, the Defendant's agent by his authority refused to deliver to the Plaintiff the butters in question, insisting that he had a right to detain them for the general balance due from *Ensor* to him. It is the established custom and usage for the butter-dealers at *Sherborne*, unless there is some express agreement to the contrary with the buyers of butter, to pay the carriers for the carriage of all butters sent by them to those with whom they deal in *London*. All the former parcels of butter consigned by *Ensor* to the Plaintiff, and conveyed by the Defendant's waggon to the Plaintiff, had been delivered to him on their arrival in *London* on demand, without making any charge whatsoever on the Plaintiff for carriage; such charges for carriage being regularly carried to the account of *Ensor*, with whom the Defendant kept a running account for that purpose, and no agreement or understanding whatsoever existed between the Plaintiff and *Ensor* that the Plaintiff was to pay the carriage for the butter, but on the contrary *Ensor*, according to the custom, was to pay it.

The question for the opinion of the Court was, Whether, under the circumstances of the goods in question having been paid for by the Plaintiff to *Ensor* as before stated, and the Plaintiff having afterwards tendered the

1805.

BUTLER v. WOOLLCOTT.

amount of the charges and carriage of the goods to the Defendant, he was entitled to recover in this action;— or, whether the Defendant had a right to detain those goods for a former demand contracted with him by *Ensor* for the carriage of other goods?

Best Serjt. being called upon by the Court to begin in support of the Defendant's right to retain the goods in question against the consignee for his general balance from the consignor, contended, that the right of the carrier to retain against the consignor being now established, (and for which he referred to *Aspinall* v. *Pickford*, 3 *Bos. & Pull. p.* 44. *n.a.*) that right must be in respect of the goods put into his hands by the consignor, and must arise the instant the goods come into his hands, and previous to any rights of the consignee: that the rights of the consignee and the carrier being derived from the same source, and the carrier's right being accompanied by actual possession, the latter ought not to be deprived of his advantage without payment of the balance due to him from the consignor. He observed, that the case of *Oppenheim* v. *Russell*, 3 *Bos. & Pull.* 42. was mainly distinguishable from the present, because it was decided on the ground of the consignor's right to stop *in transitû* being prior and paramount to the carrier's right to retain as against the consignee.

But *the Court* (without hearing *Shepherd* Serjt. *e contrâ*) were clearly of opinion, that the Defendant's claim to retain for the debt of the consignor could not be supported as against the consignee, whose property the goods were from the moment of delivery to the carrier.

Judgment for the Plaintiff.

1805.

Nov. 15.

KNIGHT *v.* FOWLER.

BEST Serjt. moved for a rule to bring up the Defendant, who was a prisoner in the *Fleet*, to take the benefit of the Lords' Act, notwithstanding a mistake in the notice; observing, that unless the rule were granted the Defendant could not be brought up within the term, there not being a sufficient number of days to give the notice required by the act. The notice given was in the usual printed form, applicable to prisoners in the King's Bench, and the words "King's Bench" in the title at the top of the notice had been struck out, and the words "Common Pleas" inserted in writing; but in the body of the notice the words "King's Bench" remained.

The Court of *C. B.* allowed a prisoner to be brought up under the Lords' act, notwithstanding the body of the notice contained the words King's Bench instead of Common Pleas. The title having been properly altered from King's Bench to Common Pleas, and there not being sufficient time to give a fresh notice.

The Court said, that the application was reasonable, and granted a rule for bringing up the Defendant.

Nov. 21.

THOMAS NORTON LONGMAN and OWEN REES *v.* JAMES TRIPP, JOHN SNOOK, and EDWARD PHILLIPS.

THE Plaintiffs in this case declared in assumpsit for the sum of 1000*l* as money received by the Defendants to the use of the Plaintiffs. The Defendants pleaded the general issue; and the cause coming on for trial at the sittings after last *Hilary* term, a verdict was taken for the Plaintiffs, damages 1000*l*., subject to the opinion of this Court upon the following case.

On the 23d of *July* 1803, *William Bulgin*, a printer at *Bristol*, being indebted to the Plaintiffs in 560*l*. for

If the printer and publisher of a newspaper assign his interest therein to a creditor as a security, but continue to print and publish as before, and no affidavit of the change of interest be delivered to the commissioners of stamps, and the printer become bankrupt, the right to the paper will pass to his assignees, under the assignment of the commissioners.

1805.

LONGMAN v. TRIPP, And Others.

goods sold to him, assigned to them a moiety or half part or share of, in, and to a certain newspaper then printed and published by him at *Bristol* aforesaid, and called "The *Bristol* Mercury;" and also all the right, title, and interest of him the said *William Bulgin* of, in, and to the same, and all profit, benefit, and advantage then or thereafter to arise for or in respect or on account thereof. And on the 23d of *September* in the same year *Bulgin* being indebted to the Plaintiffs in 300*l.* more, for other goods, in like manner assigned to the Plaintiffs the other moiety or half part or share of the said newspaper, in the same words as were used in the assignment of the first moiety. Neither of these deeds included any presses, types, or other implements for printing, but only the right of printing a newspaper under the title of "The *Bristol* Mercury," in the manner above mentioned. At the time of making each of the said assignments a letter was written and sent by the Plaintiffs to *Bulgin*, promising him that whenever he should pay the money due to them he should have the newspaper re-transferred. *Bulgin* continued, with permission of the Plaintiffs, to print and publish the newspapers after the assignments, as he had done before they were made, down to the time of his becoming a bankrupt in the month of *February* 1804. No affidavit or affirmation of the Plaintiffs having become the proprietors or publishers of the said newspaper, or having purchased *Bulgin*'s interest therein, was delivered to the commissioners of the stamp duties or any of their officers, according to the statute of 38 *Geo.* 3. *c.* 78. (*a*) After the making of the said assignments, that is, in the month of *February* 1804, *Bulgin* became bankrupt, and his estate and effects were duly assigned to the Defendants under a

(*a*) The fourth section of which requires, that as often as any of the printers, publishers, or proprietors, shall be changed, an affidavit or affirmation shall be made, containing the name, addition, and place of abode of such printers, publishers, or proprietors.

commission

1805.

LONGMAN v. TRIPP, And Others.

commission of bankruptcy regularly issued and prosecuted. The newspaper was afterwards re-sold by order of the Defendants, his assignees, and with the concurrence of the Plaintiffs, for the sum mentioned in the declaration, and the money was received by the Defendants, who in their character of assignees claimed such money for the general creditors of *Bulgin* under the said commission.

This action was brought by consent, in order to have the right decided, and all questions of form were waved on each side.

The question for the opinion of the Court was, whether under the circumstances above stated the Plaintiffs were entitled to recover in this action?

If the Court should be of opinion that they were, the verdict was by agreement to be entered up for the Plaintiffs for so much money as was due to them at the time *Bulgin* became a bankrupt: but if the Court should be of opinion that they were not entitled to recover, then a nonsuit was to be entered.

Best Serjt. for the Plaintiffs contended, that *Bulgin*'s interest in the *Bristol* Mercury was not that species of property which was within either the words or meaning of the 21 *Jac.* 1. *c.* 19. *s.* 11. which relates only to "goods and chattels" which bankrupts have in their possession, order, and disposition, and of which they take upon themselves the sale, alteration, or disposition as owners; that the mere right of using the title to a newspaper was neither "goods" nor "chattels" within the meaning of that act; that it could not be the subject of felony, which might be predicated of goods and chattels generally; and that the object of the statute was to prevent persons from gaining an improper degree of credit as the ostensible owners of "goods and chattels" of which they were not the owners, whereas *Bulgin* did not appear to the world as the owner of the *Bristol* Mercury, but

1805.

LONGMAN v. TRIPP, And others.

merely as the printer and publisher. He also insisted that *Bulgin*'s right being merely personal, did not pass to his assignees, distinguishing such rights from *choses* in actions, which he admitted did pass, and referring to the case *Ex parte Lyons*, *Ambl.* 89. where it was held that the place of a Jew Broker did not pass.

Williams Serjt. *contrà* was stopped by the Court.

Sir JAMES MANSFIELD Ch. J. With respect to the argument that this right of the bankrupt is not goods or chattels within the 21 *Jac.* 1. *c.* 19. *s.* 11. it is to be remembered that all things are to be largely and beneficially expounded under that statute for the advantage of the bankrupt estate. Many things may not be the subject of felony which may yet be within the meaning of that statute. As to the question whether the right to this newspaper passed under the assignment, can any case be found in which it has been held, that property of this description would not pass under a commission of bankrupt? I remember a case before Lord *Mansfield*, in which the advantage of a newswalk was held to be *assets* upon a plea of *plene administravit*, and I dare say that such an interest has often been sold under commissions of bankrupt. If the interest in question did not vest in the assignees, then the right is not gone, and the sale of the assignees is of no consequence. Perhaps the reason why no case upon the subject is to be found, is because the point has never been doubted.

ROOKE J. If the right which the bankrupt had in this paper were assignable by deed, it passed under the assignment of the commissioners.

CHAMBRE J. All property in the bankrupt passes by the assignment. Where the property has been assigned

1805.

LONGMAN v. TRIPP, And others.

or mortgaged it is not in the bankrupt, therefore it does not pass. The question depends upon the language of the statute 21 *Jac.* 1. which says, that if the bankrupts by consent of the owner shall have in their possession, order, and disposition any goods or chattels whereof they shall be the reputed owners, and take upon them the sale, alteration, or disposition as owners, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors. The words are, "goods and chattels." To be sure this interest is not tangible; but it would be a very narrow construction to confine the operation of the statute to tangible property. It is true that the future labour of the bankrupt cannot be transferred; but where there is some sort of interest it appears to me that it may be transferred.

Per Curiam, Judgment of Nonsuit (*a*).

Williams Serjt. mentioned, that the interest in a newspaper had been held to be deviseable in the Court of Chancery.

(*a*) *Vide etiam Hesse* v. *Stevenson*, 3 *Bos. & Pull.* 565.

1805.

Nov. 22.

MELHUISH and Another, Executors of R. HOLE, *v.* WILLIAM MAUNDER.

The Plaintiffs as executors having sued one of the co-obligors on a joint and several bond in K. B. to which usury was pleaded, suffered a nonsuit, and brought a second action against another co-obligor in C. B. in which the case having gone off pro defectu juratorum they brought a third action against all three co-obligors, in order to exclude the evidence of one upon the usury, and moved to discontinue the second action, without costs; but the Court would only allow them to discontinue on payment of costs.

THIS was an application to the Court by the Plaintiffs for leave to discontinue without costs. The action was debt on a bond, into which the Defendant together with his brother *George Maunder* had entered as sureties for *Robert Maunder*, another brother, and the defence was usury. In answer to this application an affidavit was produced, stating, that in *June* 1803 an action had been commenced in the King's Bench against *George Maunder* on the same bond, in which the same defence was pleaded, and that issue was joined in time for the Plaintiffs to have gone to trial at the summer assizes for the county of *Devon*; that the Plaintiffs not having so proceeded, the Defendant *George Maunder* ruled them to reply in *Michaelmas* term following, which they did not do till *Hilary* term 1804, and then the Defendant rejoined so as to have enabled them to go to trial at the ensuing spring assizes; that the Plaintiffs however did not give notice of trial till the summer assizes, and then a special jury was struck, and the Plaintiffs entered their record, but withdrew it on the second day of the assizes; that at the spring assizes 1805 the Defendant carried down the record by proviso, and the Plaintiffs not appearing were nonsuited; that at the time of the commencement of the said action against *George Maunder*, *Robert Maunder* had been a bankrupt, and had obtained his certificate, and was to have proved the plea of usury; that in *Easter* term 1805 the present action was commenced, and a special jury having been struck, the parties went down to trial at the last summer assizes, but the cause went off *pro defectû juratorum*; and that a third action was commenced in the King's

King's Bench on the same bond against all three brothers, in which they had been holden to bail.

Praed Serjt. shewed cause, and observing that this was an application to the favour of the Court, insisted that the conduct of the Plaintiffs, and their mode of proceeding, had not entitled them to that favour which they sought; that they had delayed proceeding in their first action as long as possible, with a view no doubt of *George Maunder* being deprived of the testimony of *Robert Maunder* by death, or some other accident, and that after the commencement of this action finding themselves still in the same danger of being defeated by his evidence, they had commenced a third action; including him with the design of making him incompetent as a witness; that at least they should have resorted to this expedient without unnecessarily putting the Defendant to the expence of this second action. He referred to the rule laid down upon this subject by Mr. Justice *Yates* in *Bennett* v. *Coker*, 4 *Burr.* 1929. *viz.* that whether there be laches or delay is the question, as decisive against the application.

Lens Serjt. in support of the application urged, that the course now adopted by the Plaintiffs was for the benefit of all parties, for if they had proceeded the Defendant would not have recovered costs, though they would have been put to additional expence. He contended, that it was not very unfair on the part of the Plaintiffs to endeavour to try a question of usury without the evidence of the principal in the bond, who would be called to avoid his own deed: that in 3 *Burr.* 1451. *Harris* v. *Jones*, the rule laid down by the Court is, that an executor shall not have leave to discontinue without costs, where he has knowingly brought his action wrong; which had not been the case here, though the Plaintiffs (as it was their duty) endeavoured to recover upon the bond

1805.

MELMUISH, And Another, v. MAUNDER.

bond given to the person whom they represented, without running the risk of being defeated by the evidence of the principal. He observed, that the reason of all three having been sued in the last action was, that the bond being joint and several, the Plaintiffs could only proceed against one or all three. He added, that the Plaintiffs, though not obliged so to do, had voluntarily paid the costs of the first nonsuit.

Sir JAMES MANSFIELD Ch. J. Upon such an application as this an administrator or executor ought to shew good ground to the Court before he is permitted to discontinue without costs. Indeed, in *Hale* v. *Norton*, *Barnes*, 169. it is laid down, that they cannot discontinue without costs. In this case sufficient ground for such a favour does not appear to me to be laid before the Court. Here has been a multiplicity of actions which might have been avoided by doing at first what the Plaintiffs have done at last, *viz.* bringing the action against all three obligors. This is only done to exclude the evidence of the co-obligor, and if the defence were not usury, it would be right to make the Plaintiffs assent to his being examined as a witness. It seems to me very fit this action should be discontinued, but not without payment of costs.

ROOKE and CHAMBRE Js. were of the same opinion.

Leave given to discontinue on payment of costs.

1805.

Nov. 22.

MOFFAT *v.* CARTER.

Notice of declaration for *Saturday*, Sunday being the essoin day of the term, held a nullity. Also that the Defendant in such case was not obliged to apply to set aside the judgment obtained for want of a plea, till notice of writ of inquiry.

SUNDAY being the essoin day of this term (until which day the Plaintiff could not file his declaration) he gave notice of declaration for the *Saturday* preceding. On the 15th of *November* he signed judgment for want of a plea; but on the 19th, on his giving notice of executing a writ of inquiry, the Defendant moved to set aside the Judgment for irregularity, as there had been no such notice of declaration as was allowed by the practice of the Court.

Marshall Serjt. shewed cause; and insisted that the notice was regular, *Sunday* being the essoin day; for as the declaration could not be filed till the essoin day, and not on that day in this term, being *Sunday*, the Plaintiff was at liberty to give notice as for the preceding day. He insisted that at all events the Defendant came too late to set aside the judgment, having allowed so many days in term to elapse without any motion, until notice of executing a writ of inquiry was given.

Best Serjt. contrà contended, and the officers of the Court supported his opinion, that the notice of declaration for the *Saturday* was irregular, and not warranted by any practice; and then urged that such notice being a nullity, he was under no necessity of coming to the court till he received notice of some effectual proceeding, which he did, on receiving notice of a writ of inquiry.

The Court were of opinion, that the notice of declaration was a nullity, and that therefore the Plaintiff had applied to be relieved as early as it was necessary, having applied as soon as he received notice of an effectual proceeding.

Rule absolute.

1805.

Nov. 22.

LAIDLAW *v.* Sir JAS. COCKBURN, Bart.

If a Defendant be holden to bail for a larger sum, and pay a lesser sum into Court, which the Plaintiff accepts, and proceeds no further in the action, the Defendant may apply under the 43 *G.* 3. *c.* 46. *s.* 3. for costs.

IN this case the affidavit of debt upon which the Defendant was arrested was for 20*l.* The Defendant paid 15*l.* 15*s.* 6*d.* into Court, and the Plaintiff took that sum out and proceeded no further in the action. Upon this an application was made to the Court, under the 43 *G.* 3. *c.* 46. *s.* 3. and a rule nisi obtained, calling on the Plaintiff to shew cause why the Defendant should not be entitled to his costs of suit.

Shepherd Serjt. now shewed cause, and insisted that the authority given by the act to the Court was to award costs to the Defendant where the Plaintiff should "not *recover* the amount of the sum" for which the Defendant had been holden to bail, and therefore the 43 *G.* 3. *c.* 46. did not apply to this case where nothing had been *recovered* in the usual acceptation of the word, that is by verdict and judgment, but the Plaintiff had merely taken out of Court the sum paid in by the Defendant.

Rooke and *Chambre* Js. (the only Judges present) were clearly of opinion, that this case was within the 43 *G.* 3. *c.* 46. though the plaintiff had not proceeded to judgment, but merely taken the money out of Court, which had been paid in by the defendant; they observed, that had the words of the act been "if he recover less than the sum sworn to," there might perhaps have been room for doubt; and added that this was a remedial law, and entitled to a liberal construction; whereas if the Plaintiff's interpretation were to prevail, a man might be holden to bail for 1000*l.* and yet, if he paid 5*l.* into Court which the Plaintiff accepted, and desisted from proceeding further, such a Plaintiff would not be liable to costs.

Shepherd

Shepherd then proceeded to shew cause upon the merits; and *Best* Serjt. supported the rule, which was ultimately discharged.

1805.

LAIDLAW v. COCKBURN.

DE SYMONS *v.* JOHNSTON.

Nov. 23.

Policy on indigo and bale-goods; the declaration alleged that "divers goods, &c. of 3000*l.* value were put on board," and afterwards averred that "the said writing or policy of assurance was made on the *said goods*, &c." Held good on special demurrer.

THE declaration in this case (which was on a policy of insurance at and from *London* to *Embden*,) after setting out the policy, alleged "that the said assurance was declared to be on indigo and bale goods, to pay average on each separate package." It then alleged the loading the goods thus, "that divers goods, wares, and merchandizes of great value, to wit, 3000*l.* were then and there, to wit, at *London* aforesaid, loaded on board the said ship or vessel, to be carried, &c." It then averred, "That certain persons using trade, &c. under the firm of *L. H. S.* and Co. were then and there, and from thence until and at the time of the loss hereinafter mentioned, interested in the said goods and merchandizes to a large amount, to wit, to the amount of all the money insured thereon; and that the said writing or policy of assurance, so made as aforesaid, was made on the said goods and merchandizes, and to and for the use and benefit and on the account of the said *L. H. S.* and Co.;" and then proceeded to state, "that the said ship or vessel, with the said goods and merchandizes on board of her as aforesaid, was, by the force and violence, &c. (perils of the sea) lost. To this declaration the Defendant demurred specially, and assigned for causes "that it does not appear in or by the said declaration, that the interest which the said persons, trading under the firm of *L. H. S.* and Co. had on board of the said ship or vessel, was of the description of goods insured by the said policy; and that the plaintiff had

1805.

DE SYMONS v. JOHNSTON.

had not averred that the said goods and merchandizes stated to be loaded on board the said ship or vessel, were indigo or bale goods." The plaintiff joined in demurrer.

Lens Serjt. in support of the demurrer, contended that the subject matter of the insurance being declared to be a particular species of goods, viz. indigo and bale goods, it was incumbent on the Plaintiff to state on the face of the declaration, that the goods put on board were goods of that description which the Defendant had insured.

But *the Court*, (consisting of *Rooke* and *Chambre* Js.) observed, that the allegation in the declaration that the policy was made on the goods put on board, completely answered the objection taken, since that could not be true, unless indigo and bale goods were loaded on board, which it would be necessary for the Plaintiff to prove at the trial.

Judgment for the Plaintiff.

STEWART, Assignee of WRIGHT, *v.* BALL.

Nov. 27.

A farmer, who occasionally buys hay, corn, horses, &c. with a view to sell again for profit, does not thereby make himself a trader within the bankrupt laws.

THIS was an action for money had and received. The cause was tried before the Lord Chief Baron at the last assizes for *Norfolk*, when the only question was, whether *Wright*, against whom a commission of bankrupt had issued, under which the Plaintiff claimed as assignee, was a trader within the meaning of the bankrupt laws? It appeared that *Wright* had occupied a large farm for about 12 years, which he had quitted about two years ago; and he was in the habit of attending *Swaffham* and *Lynn* markets, where he bought corn and cattle, and sold them again; that in particular, about six years ago, he bought seven score of lambs, being then

1805.

STEWART v. BALL.

then well stocked, and afterwards 14 score, which he kept about three weeks, and meant to sell again; that about the same time he bought some oats at *Swaffham* market, and sold them the same day in the same room, to be delivered by the original seller to the new purchaser at *Lynn;* that about four years ago he bought six bullocks, by which he said he expected to make some money, that he agisted them three weeks, and sold them again; that about four or five years ago he bought large quantities of oats, and sold them in smaller parcels; that about three years ago he bought 18 coombs of barley, and when it was carried in, he said he had sold it, and that it was to go to *Lynn;* that about two years ago he bought some hay, having then a good stack of his own, and said at the same time that he should sell some, and expected to get a good price; that he bought some hurdles, of which he sold half and used the other half; that once he bought 11 pigs, of which he sold some to any persons who would buy them, and the rest he kept three weeks or a month and then sold them; that he bought some horses, of which he used some and sold the others; and that there was but little pasture on the farm.

The Lord Chief Baron left it to the jury to determine, whether the above acts of buying and selling were incident to the occupation of the farm. If they should be of opinion that they were, he directed them to find a verdict for the Defendant; if not, for the Plaintiff.

The jury found a verdict for the Defendant.

A Rule having been obtained, calling on the Defendant to shew cause why this verdict should not be set aside, and a new trial had,

Lens Serjt. was now to have shewn cause, but the Court having called upon the other side,

Sellon

1805.

STEWART v. BALL.

Sellon and *Bayley* Serjts. now contended, that although the decision of the question was a proper matter for the consideration of the jury, yet that the question had not been put to them in the proper shape, the true point being, not whether the acts proved were compatible with the occupation of the farm, but whether the acts of buying and selling were done with a view to obtain a profit; that it was quite immaterial whether those acts were numerous or not, as was laid down in *Patman* v. *Vaughan*, 1 *Term Rep.* 572. and *Bartholomew* v. *Sherwood*, 1 *Term Rep.* 573. *in notis*, in the latter of which cases, *Buller* J. says, "The question is, whether the person buy and sell with a view to make a profit of it," that the words of the statute 21 *Ja.* 1. *c.* 19. *s.* 2. being "seeking his living by buying and selling," the true question to be considered was, whether *Wright* bought the various articles above-mentioned with a view to use them upon his farm, or to sell again, and that as he sold again in so many instances, the inference was that he bought with that intention, especially when it is observed that he purchased the lambs and the hay when he had a stock of both.

ROOKE J. (*a*) On these acts of buying and selling, the question is, whether *Wright* held himself forth to the public as a general dealer in the articles which he bought and sold? We are to consider whether the direction given by the Lord Chief Baron to the jury was wrong, and whether the jury found a wrong verdict. Now the direction appears to me to have been perfectly correct. His Lordship directed the jury to say, whether the acts of buying and selling were done collaterally to the occupation of the farm with a view to profit, or were incident to that occupation. In general the things bought

(*a*) Sir *Js. Mansfield* C. J. and *Heath* J. were both absent from indisposition.

were

were used some time upon the farm, and then sold. The instances are about six in the course of twelve years; and if he once or twice sold the articles which he bought without using them first upon his farm, as the oats four or five years ago, and the hay two, the jury were of opinion, that *Wright* was not such a general dealer in those goods as would induce them to consider him as seeking his livelihood by buying and selling. I cannot therefore say, either that the direction of the Judge, or the verdict of the Jury was wrong.

CHAMBRE J. I think that the Jury were right in their conclusion, though perhaps the Judge might have given a direction less favourable to the Plaintiff; for he does not appear to have said any thing about the publicity of *Wright*'s dealing; and if he had amplified upon this subject, his direction would have been more disadvantageous to the Plaintiff than it was. Two cases have been cited, both of which are very different from this. That of *Patman* v. *Vaughan* was the case of an innkeeper, who was in the general habit of selling liquor out of the house: the expression there made use of respecting selling as a matter of favour must be considered with reference to the circumstances of the case. If a neighbour applies to a publican, and requests to have some liquor out of the house, to whom the publican sells it as a matter of favour, the circumstance of its being sold by favour affords a good answer to the argument that the publican was a person seeking his living by buying and selling. The other case of *Bartholomew* v. *Sherwood* was a very strong finding of the Jury, and the Court did not think fit to disturb it. There was one circumstance however which makes the case very different from this. The bankrupt had been a dealer in horses before he took his farm, and the Jury in consequence of that circumstance seemed to have considered him as continuing that trade, when he

1805.

STEWART v. BALL.

bought and sold horses after he had taken his farm. I cannot help thinking however, that it was a pretty strong thing to find him a bankrupt; but in the present case all the acts of buying and selling were mere occasional bargains, and any gentleman now in court might do the same things in several instances, without making them the means of seeking his living. To grant a new trial in this case, would be to send a question to be tried of which I have no doubt.

Rule discharged.

Nov. 27.

CHAPMAN *v.* ELAND, and Another.

Bailable process against two, and declaration against one only. The Court set aside the declaration for irregularity; though it had been taken out of the office by him against whom it was filed.

THE Plaintiff having sued out a capias against *William Eland* and *William Phillips*, arrested *Eland* only, filed a declaration conditionally against him only, gave him a rule to plead, and demanded a plea. *Eland* took the declaration out of the office, and then obtained a rule to shew cause why the declaration should not be set aside for irregularity, or an *exonerctur* be entered on the bail-piece.

Best Serjt. shewed cause, and contended that although the bail were entitled to be discharged on account of this variance between the writ and the declaration, yet the former part of the rule for setting aside the declaration as irregular could not be made absolute. He cited *Spencer* v. *Scott*, 1 *Bos. & Pull.* 19. where it was determined that "proceedings are not to be stayed because two names appear in the writ, and one only in the declaration." And *Spalding* v. *Mure*, 6 *Term Rep.* 363. where the Court of King's Bench determined, that although the

Plaintiffs

Plaintiffs had abandoned their right to bail by the variance between the affidavit to hold to bail and the declaration, yet the Court could not set aside the proceedings for irregularity; and that if the Plaintiff would take advantage of the variance between the original writ and the declaration, he must do it by writ of error: and he further insisted, that the irregularity, if any, was waved by taking the declaration out of the office, since the Defendant must have known by the demand of a plea that the declaration was filed against himself only.

Bayley Serjt. *contrà* insisted, that where the process is bailable the declaration may be set aside for irregularity, if it be not against all the Defendants mentioned in the writ; he cited *Moss* v. *Birch*, 5 *Term Rep.* 722. and *Lewin* v. *Smith*, 4 *East*, 589. where the Plaintiff having holden the Defendants to bail on a joint writ, and declared against them severally, the Court set aside all the proceedings for irregularity; and *Stables* v. *Ashley*, 1 *Bos. & Pull.* 49. where this Court distinguished the cases of process bailable and not bailable, holding that in the latter the variance does not make an irregularity, but in the former it does. As to the case of *Spalding* v. *Mure* he observed, that the declaration pursued the writ, and was therefore regular, the writ being against three, and the declaration also; but the affidavit to hold to bail described the Defendants as surviving partners to *Gregory*, which the declaration did not, which only authorised the Court to discharge the bail; and as to the waver in this case, he stated, that taking a declaration out of the office only waves irregularities in the process, but not in the declaration.

Best in reply observed, that in the case of *Stables* v. *Ashley* the process was not bailable, and consequently the

1805.

CHAPMAN v. ELAND.

Court did not there decide that in case of bailable process the proceedings might be set aside, and whatever decisions might have taken place in the King's Bench, there was no case in this Court where the point had been determined.

The Court (*a*) took time to consider the question, and on this day made the

Rule absolute.

(*a*) Absent, Sir *Jas. Mansfield* Ch. J. and *Heath* J.

Nov. 26.

MELTON *v.* GARMENT.

If an action on the case for an injury to a house for which the Plaintiff had delivered a bill of 1*l.* 10*s.* be commenced in the superior Courts, proceedings therein may be stayed, the Plaintiff's remedy being in the county Courts.

THIS was an application to stay proceedings in this action, which was an action on the case for an injury done to the Plaintiff's house in *Surrey* by a cart of the Defendant's; and the ground of the application was, that the Plaintiff had himself delivered a bill to the Defendant, in which he stated the amount of the damage done to be 1*l.* 10*s.*; consequently the cause of action was under 40*s.*, and therefore unfit for discussion in the superior Courts.

Marshall Serjt. shewed cause, and insisted that this being an action in tort the county court had no jurisdiction, and consequently the Plaintiff was warranted in bringing his action in this court. He observed, that the damages being in their nature unliquidated, must be assessed through the intervention of a jury, and that though 1*l.* 10*s.* had been stated by the Plaintiff to be the amount, still the jury might give more if they thought fit.

ROOKE

1805.

MELTON v. GARMENT.

ROOKE and CHAMBRE Js. (the only Judges present) were of opinion the county court was the proper tribunal for this injury, and that the action should not have been brought in this court, and accordingly were about to make the rule absolute, when an irregularity being discovered in the affidavits upon which it was moved, both parties consented to a *stet processus*.

SEAVER *v.* SPRAGGON.

Nov. 28.

Bail may render the principal, after having failed to justify on the day for which notice of justification has been given. And if they do render, and the Plaintiff take an assignment of the bail-bond, and proceed after notice of such render, his proceedings will be set aside without costs.

THIS was a rule to shew cause why proceedings on the bail-bond should not be set aside with costs.

The writ being returnable on the first return of the term, the Defendant put in bail on the 12th of *November*, being two days sooner than necessary; on the 13th an exception was entered; on the 15th notice was given that bail would be added on the 18th; on the 19th the Defendant was surrendered, and notice thereof given between one and two in the afternoon; on the same day the Plaintiff took an assignment of the bail-bond, and sued out writs against the bail in the evening.

Lens Serjt. shewed cause, and contended that as bail did not justify on the day appointed, they could not surrender the principal, and consequently the Plaintiff was justified in proceeding against the bail; he cited *Hardwick* v. *Bluck* (*a*), 7 *Term Rep.* 297. where the Court upon

(*a*) In the *King* v. *Sheriff of Middlesex*, 7 *Term Rep.* 527. the Court said that the master, on reconsideration, thought he was mistaken in the report of the practice in *Hardwicke* v. *Bluck*, the authority of which case was also denied in *Calow* v. *Dury*, 7 *Term Rep.* 529 *in notis*.

1805.

SEAVER v. SPRAGGON.

reference to the Master declared the practice to be so, but as the Defendant was actually in custody before the assignment of the bail-bond, they set aside the proceedings on payment of costs.

Bayley Serjt. *contrà* observed, first, that if the Defendant had not put in bail until the 14th, he would have had the whole of the 19th to render the principal, and consequently the bail-bond could not have been assigned until the 20th; that the defendant therefore ought not to be prejudiced by his own readiness to put in bail. Secondly, he contended that the Plaintiff, after notice that the principal was rendered, was not justified in suing out the writs against the bail, since it could have no other effect than to enhance the costs. He cited *Wiggins* v. *Stephens*, 5 *East*, 533. where the Court held that bail, though unable to justify, were sufficient to render their principal.

ROOKE J. (*a*) I am clear that the Defendant is entitled to have the proceedings stayed. As to the first point, whether if the Defendant put in bail two days sooner than necessary, he does not wave the advantage which he might have had by waiting till the expiration of the time, the officers say nothing; but it seems to me reasonable, that he should be taken to wave that benefit: at the same time his readiness to put in bail gives a good aspect to his conduct. The second point is the most material, namely, whether a Plaintiff after he has notice that the principal has been rendered, be entitled to proceed upon the bail-bond. I think that he is not; and as the Plaintiff acted with full notice in this case, I think the proceedings

(*a*) Sir *Jas. Mansfield* Ch. J. and *Heath* J. were absent from indisposition.

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ought to be set aside without any costs, except those of the assignment.

1805.

SEAVER v. SPRAGGON.

CHAMBRE J. I am of the same opinion. It appears to me that the expence has been wantonly created.

Rule absolute without payment of costs, except those of the assignment (*a*).

(*a*) See also *Meysey* v. [redacted]*nell*, 5 *Term Rep.* 534 and *Rex* v. *Sheriff of Essex*, 5 *Term Rep.* 633.

REX *v.* BENJAMIN CROCKER, otherwise COLLINS.

Nov. 30.

The person whose name is forged as drawer of a bill is not a competent witness to disprove an indorsement on the bill made by the party who forged it, respecting the payment of interest upon that bill. A forged bill was found upon *A.* who then resided in *Wiltshire*, and has resided there about a year under a false name, but which bill bore a date at a time when *A.* lived in *Somersetshire*, in the neighbourhood of the person whose signature was forged, and more than two years previous to the period of the bill being found upon him. On an indictment of *A.* for forgery of the note in *Wiltshire*, this was held not to be sufficient evidence of the offence having been committed in that county.

THE prisoner was tried before Mr. Justice *Le Blanc* at the last assizes at *Salisbury* for forgery. The indictment charged, that he on the 1st day of *April* 1805, at *St. Edmund* in *New Sarum*, feloniously did falsely make, forge, and counterfeit, and cause and procure, &c. a certain promissory note as follows: "On demand I promise to pay Mr. *Benjamin Crocker*, or order, the sum of seventy pounds, with lawful interest for the same, value received, this 7th day of *March* 1803.

William Tucker."

with intent to defraud one *William Tucker*, against the statute, &c. There was a second count for uttering. It appeared in evidence, that the prisoner, whose name was *Benjamin Crocker*, had lived at *Winsham* in *Somersetshire* many years, and was a farmer there, and had quitted *Winsham* about *June* 1804, (so that the date of the note charged to be forged was during the time of his residence in *Somersetshire*.) *Tucker*, whose name appeared to be forged, was also a farmer living at *Winsham* in *Somerset-*

1805.

REX v. CROCKER.

shire, and still continued to live there. In *November* 1804 the prisoner by the name of *Collins* went with his wife to *Salisbury*, and took lodgings there, where he continued to reside till about the middle of *May* 1805, when he went to *London*, leaving his wife in his lodgings at *Salisbury*. In consequence of suspicions which had arisen from his conduct respecting another matter while in *London*, his lodgings in *Salisbury* were searched, his wife being there, but he being in *London*, and in a bureau belonging to the prisoner in those lodgings was found a pocket-book, in the inside of which was the prisoner's name "*B. Crocker*" written in his own hand-writing, and in one of the pockets of the pocket-book was the note stated in the indictment, in the prisoner's hand-writing, the body as well as the signature *Wm. Tucker*, but the signature at first sight appearing to be in a different hand. On the back of the note was written in the prisoner's hand-writing "Mr. *Wm. Tucker* 70*l.*" and underneath also in the prisoner's hand-writing "1 year's interest paid 3*l.* 10*s.* *B. Crocker.*"

The note was on the proper stamp for a promissory note of that value. In the same pocket-book was found at the same time another promissory note for 100*l.* payable to the prisoner or order, appearing to be signed by one *Wm. Gapper*, which *Wm. Gapper* proved not to be his hand-writing, and that he never owed the prisoner 100*l.*: on the back of that note was also written in the prisoner's hand-writing "Mr. *Wm. Gapper* sen. 100*l.*" This evidence of *Gapper*'s note was objected to by the prisoner's counsel, but the Judge received the evidence. *William Tucker* was called to prove that he never paid the prisoner 3*l.* 10*s.* for interest on this or any other note. This evidence was also objected to on behalf of the prisoner, but the learned Judge admitted it. On behalf of the prisoner it was objected, first, that there was not any evidence to go to the jury of the note having been forged in the county

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of *Wilts*, the prisoner not being in *Wilts* but in *Somersetshire* at the time when the note appeared to bear date; but the learned Judge was of opinion that the note being found in the prisoner's lodgings in *Wilts*, where he had resided for some months, was evidence to go to the jury of its having been fabricated there. Secondly, it was objected, that the note having been kept in the prisoner's possession, and never uttered or attempted to be made any use of, there was no intent to defraud. But the learned Judge held, that whether the note was made innocently or without an intent to defraud *Wm. Tucker*, was for the consideration of the jury, and to be collected from the facts proved. The jury found the prisoner guilty. The Judge reserved a case for the opinion of the Judges on the two objections, as also on the evidence objected to.

The case was argued on this day at *Serjeants'-Inn* before the Judges, *absente* Sir *James Mansfield* Ch. J.

Lens Serjt. for the prisoner. First, the note signed *Wm. Gapper* ought not to have been received in evidence. The prisoner was indicted for forging a note signed *Wm. Tucker*, and the evidence ought to be confined to that forgery. The note signed *Wm. Gapper* had no other connection with the note stated in the indictment than that of being found in the same place: no inference can be drawn from the forgery of one note with respect to the forgery of another, unless the prisoner has by his own conduct connected the two things. This case differs essentially from that of an indictment for uttering, where the question is, whether the prisoner uttered the note in question knowing it to be forged; in which case the circumstance of having other forged notes in his possession affords strong ground to presume that he knows the note uttered to be forged. Here the sole question is, whether the prisoner made a particular instrument? Now proof that he made one instrument, is no proof that he made

1805.

REX v. CROCKER.

another; and whether he knew the note in question to be forged or not, is immaterial. Secondly, *William Tucker* ought not to have been received as a witness. It will be admitted, that in case of forgery, a person whose interest is concerned, and who may be liable to an action upon the forged instrument, cannot be received as a witness. This is indeed an exception to the general rules of evidence in criminal cases; but it is an exception which is too well recognized to be disputed. It is an anomaly in the law furnishing no inference in any other case, of which Lord *Ellenborough* in *The King* v. *Boston*, 4 *East*, 582. says, "Upon what principle that anomalous case was so settled I cannot pretend to say, but having been so settled it may be too much for Judges sitting on trials to break in upon it; the anomaly can only be remedied by the legislature." If then the party interested shall not be allowed by his own testimony to destroy the instrument to which his name is forged, the rule must apply equally to every kind of testimony by which the instrument might be affected: it cannot be confined to the hand-writing only, but must apply to every thing necessary to make out the body of proof. Supposing however that it did not apply to mere collateral matters; yet in the present case the witness is called to prove that an important part of the instrument itself, namely, the indorsement, is forged. According to the case of *Searle* and Lord *Barrington*, 2 *Stra.* 826. if an action were to be brought upon this note some time hence the indorsement might be given in evidence to establish the validity of the note. In *The King* v. *Bunting*, 2 *East, Pl. Cro.* 996. the executor of a person whose promissory note had been forged was, by Mr. Baron *Adams*, rejected as a witness to prove what the prisoner said to him when he tendered him the note for payment. The evidence given by *Tucker* was as effectually a part of the evidence of forgery as if he had denied the immediate hand-writing: it conduced to the general conclusion, and

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1805.

REX v. CROCKER.

it is impossible to say what weight the jury may have given to it. The third objection is, that no evidence was given of any thing having been done in the county of *Wilts* where the indictment was found. The only proof applicable to that county is, that the pocket-book containing the forged note was found there. The charge is that of making a false instrument, and a felony was complete as soon as the instrument was fabricated. The instrument in question bears date the 7th of *March* 1803, at which time *Tucker*, whose name is forged, as well as the prisoner were both resident in *Somersetshire*. So far as this evidence goes, it tends to shew a fabrication in *Somersetshire*. There is no fact to prove a fabrication in *Wiltshire*. It is true, that the date of a forged instrument is not much to be relied upon, but if the simple fact of the instrument having been found in *Wiltshire* be sufficient to prove a fabrication in that county, the consequence would be, that if the prisoner had carried his pocket-book with him to *London*, or into any other county, and had remained there long enough to have fabricated the instrument, he might be indicted in any such county where the note happened to be found. Some fact therefore must be proved to connect the offence with the local jurisdiction. The venue is matter of substance. By the common law, if a person were mortally wounded in one county and died in another, the offender could not be indicted in either county: nor was it till 2 & 3 *Ed.* 6. *c.* 24. *s.* 2. that the legislature provided a remedy for this evil, by directing the indictment to be laid in the county where the death happens. In the same manner before the stat. 28 *Hen.* 8. *c.* 15. the offences therein mentioned if committed on the high seas could not be tried; and so the law continued with respect to all other offences committed out of the body of any county until 39 *Geo.* 3. *c.* 37. In the case of *Parkes* and *Brown*, 2 *East*, *Pl. Cr.* 992. where it was proved that a note forged by *A.* was uttered

1805.

REX v. CROCKER.

uttered by *B.* in the county of *Middlesex*, in which county *A.* then was, though not present at the uttering, the majority of the Judges held that the evidence was insufficient to warrant the jury in concluding that *A.* had forged the note in *Middlesex*. It does not lie on the prisoner therefore to disprove the commission of the offence in *Wiltshire*; it is an essential ingredient in the case of the prosecutor to prove it there. The fourth objection is, that no evidence was given of an intent to defraud. The intent to defraud must appear from something done by the party: here the instrument was never uttered; and though it might be difficult to ascertain the purpose for which it was fabricated, it would be too much to infer that the prisoner was looking for a future opportunity to make a fraudulent use of it. He had time for reflection, and perhaps he never would have uttered it. The note was payable on demand, and not being of a recent date it would on that account be the more suspicious if he had attempted to make use of it. If the note was made at the time when it bore date, it can hardly be supposed that the prisoner would have kept it so long with intention to make a fraudulent use of it; if it was a recent fabrication, it is hardly to be supposed that the prisoner would have put so distant a date to it, had he intended to pass it away. The fair inference therefore is, that the prisoner had no intent to defraud.

Pell, for the prosecution. The principal points upon which the jury had to determine were, first, whether the prisoner forged the note in question with intent to defraud *Wm. Tucker*. Secondly, whether that forgery was committed in the county of *Wilts*. The forgery of the note was clearly proved, and it can hardly be contended that if it were forged with a criminal intent, but never uttered, it is not an offence within the statute. It must either be said, that the note never having been uttered no offence

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1805.

REX v. CROCKER.

was committed, or that uttering is the only evidence from which the intent to defraud can be inferred. That a person may be convicted for forging an instrument which he never utters, is decided by *Elliott*'s case, 2 *East, Pl. Cr.* 951., where it was expressly stated, that the fact of the forgery was brought home to the prisoner, though the note was never published, it having been found in his possession at the time he was seized; yet no objection was taken to the conviction on that ground, there being circumstances sufficient to warrant the jury in finding a fraudulent intention. So here, the body of the note and the signature were apparently of different hand-writings, yet both written by the prisoner. The prisoner went by a false name in *Wiltshire*. The indorsement was not true. The instrument had the proper stamp, which would not have been put to it if it had not been intended to be used: and another forged note was found in the prisoner's possession. The objection with respect to the locality of the offence is the most important. The very fact of the instrument in question having been found in the prisoner's custody, is evidence to go to the jury of the offence having been committed there. In *Elliott*'s case (*a*) the instrument was

(*a*) The following statement of the facts of Elliott's case was referred to by the counsel for the prosecution, and is rather fuller than the statement in 2 *East. Pl. Cr.* 951.

The four first counts of the indictment charged the prisoner with forging and counterfeiting a bank note, or a note in form of a bank note. The fifth and last count, upon which the counsel for the crown relied, charged him with forging and counterfeiting a note for payment of money, with intention to defraud the governor and company of the bank of *England*, and was taken and agreed to be framed upon the stat. 31 *G. 2. c. 22. s.* 78. which extends the stat. 2 *G. 2. c.* 25. (and is made perpetual by 9 *G. 2. c.* 18.) to all corporations.

This was in substance the evidence. The prisoner, during the course of the winter, applied under the fictitious name of *Pearce* to one *Mary Smith* (who made paper moulds for the bank of *England* paper) to make for him a pair of small fine moulds, finer than those she made for the bank. She refused to make them. In *April* 1777, the prisoner delivered to one *Robert Ryland*, a copper-plate printer, in the presence of other witnesses, two copper-plates, and a quantity of fine paper, with orders to strike off two

1805.

REX v. CROCKER.

was found upon the prisoner in *Kent*, where the indictment was laid; but no evidence was given to prove the actual fabrication of the instrument in that county. On the contrary, the circumstances of the case afforded some inference that the forgery was not committed there. It appeared that *Ryland*, having struck off a quantity of notes, delivered them, together with the plates, to the prisoner, at a public-house in *Fleet-Ditch*. The note in question was found upon the prisoner at *Dover*, and the plate at a lodging upon *Tower Hill*; yet the objection now made, that the evidence did not afford proof of the offence being committed in *Kent*, was either overlooked, or thought of no weight. In *Parkes* and *Brown*'s cases the objection was taken; but that case does not decide the present; the objection there was, that the uttering by *Brown* in *Middlesex*, was not sufficient evidence that *Parkes* had committed the forgery in that county, but

two dozen from each plate by the next day; one plate was for the sum of 20*l.* and the other for 50*l.* both payable by the governor and company of the bank of *England*. *Ryland* struck off the notes according to his instructions, and delivered the notes and copper-plates together to the prisoner the next day, at a public-house in Fleet-ditch. Such notes were found upon the prisoner when he was taken into custody at *Dover*, produced in Court, and among them the counterfeit note, the tenor of which was stated in the indictment. The copper-plates were found at an obscure lodging near Tower-hill, by the information of the prisoner himself, who went in custody of an officer, who broke open the chamber door and took them out of a box directed for *Wm. Pearce*, and delivered them to the solicitor of the bank. Being produced in Court, the specific plate from which the forged note was struck was identified by *Ryland*, from a scratch which he had observed in the plate. The words usually printed in bank notes were printed in the counterfeit note; those usually written were in writing, except that the number was not filled up, nor was the word pounds inserted in the body of the note, and the fabric of the paper had not wrought in its texture what is commonly called in the real bank notes, the water mark, namely, the words, Bank of *England*. A bank note of the same date and tenor, except as above mentioned, was also produced. The paper of the counterfeit note seemed somewhat thicker, and both were put into the hands of the jury. The officers of the bank proved that a bank note, with the like omission in the body, being regular in other respects, would be paid after passing the examiner's office.

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1805.

REX v. CROCKER.

some of the Judges thought that even this, in the absence of other proof, was evidence against *Parkes*, he himself being in *Middlesex* at the time; and the majority of the Judges agreed that it was a question of evidence for the Jury, though they did not think the proof in that particular case sufficient to warrant the conclusion. In the present case, however, the instrument was found in the custody of the prisoner himself. Here, therefore, the evidence is stronger than in the case of *Parkes* and *Brown*, and the Jury were warranted in finding the prisoner guilty in *Wiltshire*. In the case of the *King* v. *Hensey*, 1 *Bur.* 645. it was holden that a letter in the prisoner's hand-writing, dated *Twickenham*, in *Middlesex*, was evidence of an overt act committed in that county. With respect to the admissibility of the evidence as to the forgery of the note signed *Wm. Gapper*, it afforded strong proof of the mind and purpose with which the note stated in the indictment was fabricated, and in this view it was receivable according to the case of the *King* v. *Wylie*, *ante*, vol. 1. 92. There, upon an indictment for uttering a forged note, evidence, that the prisoner had uttered other forged notes, was received, to prove the prisoner's knowledge of the note stated in the indictment, being forged. So if a man be indicted for uttering base coin of one denomination, proof that he has uttered base coin of another denomination, is evidence of knowledge. Here the question is upon the intent of the party, the same principle therefore applies. Lastly, as to the admissibility of *Wm. Tucker* as a witness, it may be admitted that he could not be received to prove the forgery; but the rule goes no further. The rule itself is contrary to all the general principles of law, and is not to be extended beyond the limits to which it has been hitherto confined. In the *King* v. *Bunting*, the evidence of the executor was properly rejected because it went to the very gist of his interest; but in *Parr*'s case, 2 *East. Pl. Cr.* 997. where the

1805.

REX v. CROCKER.

the prisoner had personated *Isaac Hart*, and received a dividend due to him, *Hart* was admitted to prove the amount of his stock at the bank, and that the sum for which the prisoner obtained a warrant was the exact sum due to him; but he was not examined to the falsity of the signature. It has been said that there is no necessity to call the person whose name is forged, since other persons are capable of proving that circumstance; but in the present case no one but *Tucker* could have been called to prove that interest had not been paid on the note. *Tucker* had no interest in giving the evidence which he did, for by denying that he had paid interest, he charged himself with it if the note was good, and if it was already proved to be forged, he had no interest at all.

The opinion of the judges was never publicly delivered; but a pardon was obtained for the prisoner, and he was discharged. It was understood that the majority of the learned Judges considered the objection to the admissibility of *Tucker*'s evidence well founded, and that if that point had been otherwise, still there was not sufficient evidence that the offence was committed in the county of *Wilts*.

REGULA GENERALIS.

IT IS ORDERED, That from and after the last day of this Term insolvent Debtors petitioning under the Lords' Act, and subsequent Acts, for their further relief, shall be brought into Court for that purpose during Term Time, upon the days appointed for the *London* Sittings at *Nisi prius*, and on *Saturdays*, and no other days.

J. MANSFIELD.
J. HEATH.
G. ROOKE.
A. CHAMBRE.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED IN THE Court of COMMON PLEAS, IN Hilary Term,

In the Forty-sixth Year of the Reign of GEORGE III.

1806.

DE LUNEVILLE *v.* PHILLIPS.

Jan. 23.

The Court refused to allow judgment to be entered on an old warrant of attorney, it appearing by the Plaintiff's affidavit that she was resident in an enemy's country.

VAUGHAN Serjt. moved to enter up judgment on an old warrant of attorney, stating that there was an objection to this motion on the ground of the Plaintiff's affidavit stating her place of residence to be *Paris*. He submitted, that however valid such an objection might be when pleaded, still the Court would not notice it on such an application as the present, where their attention was not necessarily called to it.

But *The Court* thought the objection insurmountable, and observed, that if they were inadvertently to have made the order prayed, it must be set aside upon any subsequent application.

1806.

Jan. 31.

FORBES v. PHILLIPS.

Affidavit of debt against *A.*; capias against *A.* and *B.* and declaration against *A.*; only by whom bail was put in; held regular.

IN this case the Plaintiff's affidavit of debt was against *Phillips* only, the writ of capias against *Phillips* and one *Francis Forbes*, and the declaration against *Phillips* only, by whom bail had been put in. A rule *nisi* for entering an *exoneretur* on the bail-piece having been obtained.

Bayley Serjt. shewed cause, and observed, that in bailable process the name of *John Doe* was always added to that of the real Defendant, and that it could make no difference whether the name of *John Doe*, or the name of *Francis Forbes* was added to that of *Phillips* the real Defendant, especially as the *ac etiam* part of the writ was against *Phillips* only.

Praed Serjt. *contrà* insisted that the Plaintiff was irregular, the *capias* against two not being warranted by the affidavit to hold to bail against one only; and that the Court could know nothing of the *ac etiam* of the writ. He cited *Gilby* v. *Lockyer*, Dougl. 218. ed. 3. *Bett* v. *Goodman and another*, Barnes, 70. *Holland* v. *Johnson*, 4 *Term Rep.* 695. *Holland* v. *Richards*, 4 *Term Rep.* 697. n. (*b*). *Goodwin q. t.* v. *Parry*, 4 *Term Rep.* 577. and *Moss and another* v. *Birch and another*, 5 *Term Rep.* 722.

The Court (consisting of *Heath*, *Rooke*, and *Chambre* Js.) were of opinion, that as the affidavit to hold to bail was correct, and the bail properly put in for *Phillips* only, the mere introduction of the name of *Francis Forbes* into the *capias* did not operate to make the proceedings irregular, any more than the introduction of the name of *John Doe*, which was admitted not to create an irregularity.

Rule discharged.

1806.

SWAIN *v.* SENATE.

If a Plaintiff collude with the Defendant's bail and his attorney, to deprive the Plaintiff's attorney of his costs by settling a debt, and accepting a part payment without the intervention of the Plaintiff's attorney, the Court will not restrain the Plaintiff's attorney from proceeding against the bail, in order to recover such costs.

THIS was a rule to shew cause why proceedings against the bail should not be set aside with costs.

It appeared that the Defendant in *August* 1804, being in custody upon an arrest for 180*l.*, put in bail, and then went abroad. That in *November* of the same year the Plaintiff called at the house of one of the bail, and proposed to settle the action by taking 40*l.* in money, and his acceptance for 35*l.* 19*s.* 9*d.* in discharge of the debt and costs, to which the bail agreed, and requested the Defendant's attorney to attend the Plaintiff for the purpose of settling the matter accordingly. That the Defendant's attorney soon after attended the Plaintiff at the *London* Coffee-house, the Plaintiff being a prisoner in the *Fleet*, and paid 40*l.* by a check, and an acceptance for 35*l.* 19*s.* 9*d.*, which the Plaintiff accepted, and gave a receipt in the following words:

In the Common Pleas. *Chas. Swain* v. *Edwd. Senate.*
Received of the Defendant, by payment of Messrs. *W.* and *C.* as bail, 75*l.* 19*s.* 9*d.*, in full discharge of the debt and costs in this cause, hereby agreeing to pay my own attorney my costs. As witness my hand the 28th day of *November* 1804.

£75. 19. 9. *Chas. Swain*, the above Plaintiff.
Witness *J. B.*

Soon after this settlement the attorney for the Defendant informed the Plaintiff's attorney thereof, who notwithstanding proceeded to judgment, and issued a *scire facias* against the bail.

Lens Serjt. shewed cause, and contended, that as the compromise had been made and the money paid without the knowledge of the Plaintiff's attorney, the transaction

1806.

SWAIN v. SENATE.

must be considered as collusive, and that the Plaintiff's attorney therefore was entitled to proceed for the recovery of his costs. He cited the case of *Read* v. *Dupper*, 6 *Term Rep.* 361. where the Defendant's attorney having paid the debt and costs to the Plaintiff, after notice from the Plaintiff's attorney not to do so till his bill had been first satisfied, the former was compelled to pay over again to the latter the amount of his lien on the debt and costs; and *Randall* v. *Fuller*, 6 *Term Rep.* 456. where the Court held, that the lien of the Plaintiff's attorney on the debt and costs in the cause must be satisfied before the Defendant could set off any costs recovered by him in another cause against the Plaintiff; also *Wilkins* v. *Carmichael. Dougl.* 104. where Lord *Mansfield* says, that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit for which he has been employed for him until his bill is paid.

Best Serjt. *contrà* insisted that the bail had a right to compromise the action wtth the Plaintiff, and that as no notice had been given by the Plaintiff's attorney not to pay over the money, the attorney for the bail was justified in paying it over. He cited the case of *Welch* v. *Hole*, *Dougl.* 238. where the Defendant having compromised with the Plaintiff, and paid ten guineas for debt and costs, the Court refused to make him pay it over again to the Plaintiff's attorney, he not having given notice not to pay it; and Lord *Mansfield* said that although the Plaintiff's attorney might stop the money if it came to his hands, and that if the Defendant paid the money after notice not to do so, the Court would compel him to pay it over again; yet he thought the Court could not go beyond those limits. He further observed, that the practice of the Courts of King's Bench and Common Pleas differed with respect to the lien of an attorney for his costs, the latter Court having uniformly holden, that the lien of the attorney

attorney is subject to all equitable claims against his client (*a*).

1806.

SWAIN v. SENATE.

Sir J. MANSFIELD Ch. J. I do not collect from the cases stated that any positive rule has been laid down which obliges us to hold that the Plaintiff's attorney may be cheated of his costs, unless he has given notice to the Defendant or his attorney not to pay them over. The case which is strongest in favour of this application rather appears to me to imply the contrary. Lord *Mansfield* there seems to think, that ten guineas might be a reasonable compensation from a man who had lain two years in gaol, which the Defendant in that case had done. The present is not the case of the Defendant himself paying a sum of money to the Plaintiff in consequence of an agreement between them without the intervention of a professional man. Here the bail himself calls upon the Defendant's attorney, who goes to the *London* Coffee-house within the rules of the *Fleet*, and there settles with the Plaintiff. This was a strong measure for an attorney who must have known that the Plaintiff's attorney had a lien for his costs. The debt was 180*l.*, and it is not suggested that any thing less than the whole debt was due. The whole debt then and the costs being due, the Plaintiff a prisoner is content to take 40*l.* in money, and an acceptance for 35*l.* 19*s.* 9*d.* more, and to give up the rest, amounting to 104*l.*, and his costs. Why should the Plaintiff, who was a distressed man, give this up; and how could the Defendant's attorney acting for the bail possibly authorise such a transaction without feeling that he was taking out of the hands of the Plaintiff's attorney that, which if it had been paid in the regular course, would have enabled the latter to obtain his costs? It ap-

(*a*) See *Hall* v. *Ody*, 2 *Bos.* and *Pull.* 28. and the cases there cited.

1806.

SWAIN v. SENATE.

pears to me, that one great object of this transaction was to deprive him of his costs; and if the payment was fraudulent and collusive, I think that the Plaintiff's attorney ought to be allowed to proceed with the suit for the recovery of his costs.

ROOKE J. My opinion has long been, that an attorney is first to look to his own client for his security, and upon that ground I have always thought, that where the Plaintiff's attorney sets up a lien on one side, and the Defendant insists on a set-off on the other, the lien of the attorney must be subject to all the equitable claims of the other party. But I never thought (and I have heard the contrary held) that where the Plaintiff and Defendant leagued to cheat the attorney, the Court is not authorised to interfere. The question here is, whether under the circumstances it does not appear that the transaction was a fraudulent attempt to deprive the attorney of his costs (*a*). I think it does, and that the Plaintiff's attorney therefore ought to be at liberty to proceed for his costs, and to recover nominal damages.

CHAMBRE J. I think that the fraud is quite apparent upon the face of the transaction. The case is much stronger on account of the interposition of the attorney. No inducement is stated for the Plaintiff to accept so much less than his due, unless it were done with a view to cheat the Plaintiff's attorney of his costs; in which object the Defendant's attorney co-operated. It appears to me indeed that the settlement itself is void; for according to the case of *Fitch* v. *Sutton*, 5 *East*, 230. acceptance of a less sum is not a satisfaction in law of a greater sum due.

(*a*) Vid. *Ormerod* v. *Tate*, 1 *East*, 464.

The

The Court was about to discharge the rule, when *Best* prayed that the proceedings might be stayed on payment of the costs, which the Court ordered accordingly.

1806.

SWAIN v. SENATE.

STEVENSON *v.* GRANT, and Another.

Feb. 3.

Scire facias against Bail.

The Court refused to allow amendment of a declaration in *scire facias* against bail, who had failed to surrender their principal (then in custody) before the *quarto die post* of the second writ.

THE declaration was intitled generally of *Trinity* term 45 *Geo.* 3. and began thus: *Middlesex* to wit, It was commanded to the sheriff as follows, Whereas *George Grant*, of, &c. and *John Fielder*, of, &c. lately in the Court of our Lord the King of the Bench, to wit, in *Michaelmas* term, in the 44th year of his reign, came before Sir *Alan Chambre* knight, &c. and acknowledged to owe to *James Stevenson*, the sum of 2100*l.* &c. upon this condition, that if judgment should happen in the same Court of the Bench, in a certain plea, &c. to be given for the said *James* against *William Davis*, late of, &c. then the said *William* should satisfy such damages which should be adjudged to the said *James* against the said *William*, in the same Court here in the plea aforesaid, or should render his body on that occasion to the prison of the *Fleet*, and although the said *James* afterwards, to wit, &c. recovered against the said *William* in the said plea 1260*l.* &c. whereof the said *William* is convicted, as by the record and process thereof now remaining in the same Court manifestly appeareth, nevertheless the said *William* hath not satisfied the said damages, nor rendered his body, &c. according to the form and effect of the recognizance aforesaid, and as well the said recognizance as the said judgment still remain in full force and effect in no wise set aside, reversed, paid off, or satisfied,

1806.

STEVENSON v. GRANT, And Another.

as on the information of the said *James* our said Lord the King is given to understand. And because our said Lord the King is willing that those things, which in the same Court are rightly done and recognised, should be duly carried into execution, commanded the said sheriff, that by honest and lawful men, &c. he should make known to the said *George* and *John* that they be here in fifteen days of the *Holy Trinity*, to shew, &c. The record then stated that the Plaintiff came on the *quarto die post*, and that the said *George* and *John*, although called, came not; that the sheriff returned *nihil*. Therefore, as before, the sheriff was commanded, &c. that by honest and lawful men, &c. he should make known to the said *George* and *John* that they be here from the day of the *Holy Trinity* in three weeks. The record then stated the second default of the said *George* and *John*, on the *quarto die post*, and a second return of *nihil* by the sheriff, whereupon the said *James* prays execution against the said *George* and *John*, to be adjudged to him of the damages aforesaid, according to the force and effect of the said recognizances, &c.

The Defendants demurred, and shewed the causes following, that is to say, for that the said declaration is intitled generally of *Trinity* term, in the 45th year of the reign of King *George* the Third, which relates in law to the first day of the term, although the writ of *alias scire facias*, in the said declaration mentioned, was not returnable until three weeks from the day of the *Holy Trinity* in *Trinity* term aforesaid. And also for that the first writ of *scire facias* is inartificially recited in the said declaration; and it does not appear thereby by whom the said sheriff was commanded as therein mentioned; and also for that it does not appear in or by the said first writ of *scire facias*, that the said supposed recognizance therein mentioned, was ever inrolled in his said Majesty's Court of the Bench aforesaid, nor does the said *James* verify

verify or offer to prove the same by the record of the said recognizance. And also for that the said *James* hath concluded his said declaration, by praying execution against the said *George* and *John*, to be adjudged to him of the said damages aforesaid, according to the force, form, and effect of the said recognizance, instead of concluding it as he ought to have done, by praying execution to be adjudged to him against the said *George* and *John*, of the said sum of 2100*l.* by them in form aforesaid acknowledged, or against the said *George*, of the said sum of 2100*l.* by him in form aforesaid acknowledged, and against the said *John*, of the said sum of 2100*l.* by him in form aforesaid acknowledged, according to the force, form, and effect of the said recognizance, &c. And also for that the said declaration is in other respects uncertain, insufficient, and informal, &c.

The Plaintiff joined in demurrer, but afterwards obtained an order from a Judge at chambers, for leave to amend, in the several particulars stated, as causes of demurrer.

In the course of the last term a rule was obtained, calling on the Defendants to shew cause why this order should not be discharged. It appeared that at the time when the writs of *scire facias* were sued out, and the returns of *nihil* made, *Davis* the principal was a prisoner in the *Fleet*, charged in execution in other actions; but the Defendants had omitted to surrender him in this action until after they were fixed, but that they had since done so.

Bayley and *Onslow* Serjts. shewed cause. The only ground upon which the amendments prayed for can be resisted, is, that it has not been usual for the Court to allow amendments against bail, but these amendments are entirely discretionary, and there is no reason in the present case why the Court should not allow the amendment prayed. There are many cases in which the Court has amended proceedings in *scire facias*, *Hanson* v. *Chamberline*,

1806.

STEVENSON v. GRANT, And Another.

line, *Cook. Cas. Pra.* 76. *Barnes*, 3. and in *Sweatland* v. *Beazely*, *Barnes*, 4. *scire facias* against bail and all proceedings thereon, were amended after issue joined on *nul tiel record*. It is true that the practice of allowing such amendments has been in disuse, and therefore in the case of *Perkins* v. *Pettit*, 2 *Bos.* and *Pull.* 275. the Court refused to allow an amendment of that sort, but at the same time expressly desired that their refusal to amend might not be drawn into precedent, since after that notice they should not think themselves bound to abstain from exercising the power of granting such amendments in future. It is said generally in *Tidd*'s Practice, 1063, when speaking of a *scire facias* against bail, that a *scire facias* is not amendable; but the authorities referred to do not support the proposition. The cases of *Bucksome* v. *Hoskins*, 1 *Salk.* 52. 2 *Ld. Raym.* 1057. and *Vavasor* v. *Baile*, 1 *Salk.* 52. were cases of *scire facias* on judgment. As to *Villars* v. *Parry*, 1 *Ld. Raym.* 182. 547. which was *scire facias* against bail, although the Court of *Common Pleas* at first refused to amend, yet *Holt* C. J. expressed an opinion in the *King's Bench* that it was amendable, and upon application being again made to the *Common Pleas* for an amendment, the Court was equally divided. It does not appear that the case of *Hillier* v. *Frost*, 1 *Stra.* 401. was a *scire facias* against bail, so that the case of *Gray* v. *Jefferson*, 2 *Stra.* 1165. is the only one of all the cases cited in which it is determined that *scire facias* against bail is not amendable; and as the Court in *Perkins* v. *Pettit* declared that they had no doubt of the power to amend, and should in future exercise that power, there can be no objection to the amendment being now made. As to the causes of demurrer, there would probably be no ground for them, if the case were argued. A declaration in *scire facias* to reverse a judgment returnable the last return of a term may be entitled generally of that term, *Ward* v. *Gansal*, 3 *Wils.* 154. As to the second objection, the

declaration pursues the usual form, it being never customary to state that the sheriff was commanded by the King. In *Impey's Mod. Plea.* the form is, it was commanded to the sheriff, whereas, &c. and the subsequent part of the declaration, which states that our said Lord the King is willing, &c. shews by whom the command was given. With respect to the want of an averment, that the recognizance is inrolled, the same answer may be given that it has never been usual to insert *prout patet per recordun*, after the statement of the recognizance, it being fully supplied by the expression after the statement of the judgment, as by the record and process thereof manifestly appeareth. The last objection is a mere matter of form, and the amendment will be in furtherance of justice.

Best Serjt. contrà, If the demurrer were argued, it would be found that all the objections, except one, would probably turn out to be well founded; but the only question now is, whether the Court will allow this amendment against bail. In the case of *Gray* v. *Jefferson*, the Court decided that such amendment should not be allowed, and notwithstanding what was said by Lord *Eldon* in the case of *Perkins* v. *Pettit*, Lord *Alvanley* in a subsequent case of *Fulwood* v. *Annis*, 3 *Bos. and Pul.* 321. which was an application to amend the *teste* of a *scire facias* against bail, said, " the power of amending writs of *scire facias* against bail is certainly discretionary; but the Court, in the exercise of their discretion, would not think proper to cure any irregularities of which the bail are entitled to take advantage." In the present case, *Davis* being a prisoner, the Plaintiff might have charged him in execution, instead of which he gets two returns of *nihil*, and because the Defendants omit the form of surrendering before the *quarto die post* of the second writ, proceeds against them by declaring in *scire facias*; he is not, therefore, entitled to

1806.

STEVENSON. v. GRANT, And Another.

to any favour; the amendments are not in furtherance of justice, and if he has made any mistake in his proceedings, the Court ought not to assist him to the prejudice of the bail. In the case of *Hoare* v. *Mingay*, 2 *Str.* 915. where the Plaintiff proceeded on a recognizance for bail, by action in the *Common Pleas*, but finding that the Defendant was an attorney of the *King's Bench*, was obliged to desist and file his bill in the latter Court, and the Defendant surrendered the principal before the commencement of the second action, the Court of *King's Bench* held the surrender good, and stayed the proceedings, saying that it was the Plaintiff's fault not to begin right at first.

Sir JAS. MANSFIELD C. J. I do not feel the reason why mistakes in proceedings against bail should not be amended, as well as mistakes in other cases; persons must employ clerks in these proceedings as well as others; and if mistakes arise, I do not see why they should not be amended. But in the present case we are called upon to aid the Plaintiff against the bail, without sufficient reason for exercising the power to amend. The Plaintiff might have charged the principal in execution, and because the attorney for the bail happened to omit the form of surrendering the principal, the Plaintiff chuses to proceed against the bail. In such a case I feel no inclination to assist him, and I think that the amendment ought not to be allowed.

HEATH, ROOKE, and CHAMBRE, Js. concurring,

Rule absolute.

When this case first came on, the Court intimated a strong opinion that the writ of *scire facias*, as recited in the declaration, was bad for want of an averment, that the recognizance was of record, and thought that the words,

words, "as by the record and process thereof now remaining in the same Court manifestly appeareth," applied to the Judgment, and not to the recognizance.

1806.

STEVENSON v. GRANT, And Another.

GERRARD, Assignee of EDWARD, WILLIAM, and JOHN NORRIS the Younger, Devisees of JOHN NORRIS the Elder, *v.* COOKE.

Feb. 3.

COVENANT, the declaration stated that *John Norris* the elder, on the 19th of *September* 1798, was seised in fee of a messuage, situate in the *High Street*, in *Uttoxeter*, in the county of *Stafford*, in his own occupation; and also of a new erected messuage, in the said *High Street*, then untenanted, which was separated from a messuage of the Defendant, situate in the said *High Street*, by a piece of land only eleven feet wide; that by indenture of the said 19th of *September* 1798, between the said *John Norris* the elder of the first part, the Defendant of the second part, and one *Francis Osborn* of the third part, the Defendant granted unto the said *John Norris* the elder, his heirs and assigns, full and free liberty, power and authority to and for him, his heirs and assigns, owners or occupiers for the time being of the before mentioned houses of the said *John Norris*, or either of them, or of any of the buildings, gardens, yards, and appurtenances to the said messuages thereto, or either of them, belonging or appertaining, and to and for his, their, and each and every of their customers, servants, workmen, or other persons having lawful occasion with or without horses, carts, or other carriages, thenceforth and from time to time, and for all times for ever thereafter, to have ingress, egress, and regress, and to pass and repass in, upon, through, over, out of, along, and across the said piece or parcel of land or ground lying between the said messuage

A. granted to *B.* his heirs and assigns, occupiers of certain houses abutting on a piece of land about 11 feet wide, which divided those houses from a house then belonging to *A.* the right of using the said piece of land as a foot or carriage way; and gave him "all other liberties, powers, and authorities, incident or appurtenant, needful or necessary to the use, occupation, or enjoyment of the said road, way, or passage," held that under these words *B.* had a right to put down a flag-stone upon this piece of land in front of a door opened by him out of his house into this piece of land.

1806.

GERRARD v. COOKE.

messuage then in the occupation of the said Defendant, and the said messuage and premises of the said *John Norris* for the length of 20 yards, but no further, to and from the *High Street*, to and from the said before-mentioned messuages of the said *John Norris*, or either of them, and to and from any of the buildings, gardens, yards, or other appurtenances to the said messuages of the said *John Norris*, or either of them belonging or appertaining: and also all other liberties, powers, and authorities incident or appurtenant, needful or necessary to the use, occupation, or enjoyment of the said road, way, or passage, and other privileges thereby granted or conveyed, or intended so to be, to hold to the said *John Norris*, his heirs and assigns, to the only proper use and behoof of the said *John Norris*, his heirs and assigns for ever, and to be incident and appurtenant to the said two messuages of the said *John Norris*, and each of them, and to the buildings, yards, gardens, and other members of the same, from thenceforth for ever; and the Defendant covenanted that the said *John Norris*, his heirs and assigns, owners or occupiers for the time being of the said messuages, or either of them, or of the buildings, gardens, yards, or other appurtenances thereto belonging, should quietly enjoy the way, road, path, or passage, and the liberties, privileges, powers, and authorities thereby granted and conveyed, or intended so to be, without interruption of the Defendant, and that the Defendant should not nor would injure, spoil, or damage the pavement of the said piece or parcel of land or ground, or stop up, molest, obstruct, or hinder the said *John Norris*, his heirs or assigns, in the possession, use, occupation, or enjoyment of the easements or other privileges thereby granted to or enjoyed by him as owner or occupier of the said messuages, or either of them. That by virtue of the said indenture the said *John Norris* the elder became entitled to the said way, and the liberties, powers, and authorities thereby granted.

1806.

GERRARD v. COOKE.

granted. That on the 29th of *December* 1801 he made his will, and devised the said messuages, with the appurtenances, together with the said way, and the liberties, privileges, powers, and authorities by the said indenture granted to *Edward*, *William*, and *John Norris* the younger, in fee, and died. That *Edward*, *William*, and *John Norris* the younger entered and became seised; and on the 26th of *March* 1803 did infeoff the said Plaintiff of the said new-erected messuage, and granted to him the said way, and the liberties, privileges, powers, and authorities by the said indenture granted, and other appurtenances, to hold to him, his heirs and assigns for ever, by virtue whereof he became seised in fee of the said new-erected messuage, with the appurtenances, and entitled to the said way and the said liberties, privileges, powers, and authorities by the said indenture granted. That the Plaintiff on the 1st of *January* 1805, by virtue and in the due exercise and enjoyment of the liberties, privileges, powers, and authorities by the said indenture granted, and in order to have and enjoy the said way, made a door in his said messuage leading therefrom into the said piece of land at a certain part within the length of 20 yards, and put, laid, and placed in the said pavement of the said piece of land a certain flag-stone against the said door within the length aforesaid, for the convenience and necessary use and enjoyment of the said way there; yet the Defendant not regarding his covenant, but intending to obstruct the Plaintiff, tore up, took up, spoiled, and damaged the pavement of the said piece of land within the space aforesaid, and took up and removed the said flag-stone, by reason whereof the Plaintiff was obstructed in enjoying of his way in as ample a manner as he ought to have done, contrary to the covenant of the Defendant.

The Defendant pleaded first *non est factum*. Secondly, That *John Norris* the elder did not devise *modo et formâ*.

Thirdly,

1806.

GERRARD. v. COOKE.

Thirdly, That *Edward*, *William*, and *John Norris* the younger did not enfeoff *modo et formâ*. Fourthly, As to taking up and removing the flag-stone *actionem non*, because he says that he the Defendant before and at the said time when, &c. was lawfully possessed of the said piece of land in the said indenture described; and being so possessed thereof, the Plaintiff before the said time when, &c. to wit, on the 1st of *January* 1805, wrongfully put, laid, and placed the said flag-stone in the said declaration mentioned in and upon the said piece of land, and in the soil thereof, otherwise than for the necessary repairing of the said way there, or for enjoying the same, for which reason the said Defendant took up and removed the said flag-stone, which he lawfully might for the cause aforesaid, and this, &c. wherefore, &c. Fifthly, As to the residue of the supposed breach of covenant, *actionem non*, because he says that he did not tear up, take up, spoil, or damage the pavement of the said piece of land, or obstruct the Plaintiff, *modo et formâ*, concluding to the country.

The replication joined issue on the 1st, 2d, 3d, and 5th pleas, and as to the 4th the Plaintiff traversed the allegation that he had wrongfully put, laid down, and placed the said flag-stone in the said piece of land, and in the soil thereof, otherwise than for the necessary enjoyment of the said way.

By the rejoinder issue was joined on the fourth plea.

At the trial before Lord *Ellenborough* Ch. J. at the last summer assizes for *Stafford* the only question was, how far the right of the Plaintiff to put down the flag-stone mentioned in the declaration was incident or appurtenant, needful or necessary to the use, occupation, or enjoyment of the road, way, or passage, and other privileges granted by the deed of the 19th of *September* 1798. It was proved that the house where the flag-stone was put down was built

built for *John Norris* the elder in 1797. That the house when first built had no door-way into the passage, but that a door-way was afterwards made and used for 12 months without any flag-stone, after which the Plaintiff put down the flag-stone in question before the door-way; that the stone was 2 feet 10 inches in length, and 2 feet in width, one inch and a half higher than the surface on the side next the door-way, and about one inch on the outside; that it is usual to put down flag-stones before door-ways: that the door-way in question might have been used without the stone, and conveniently, but not so conveniently as with it. A verdict was found for the Plaintiff by consent, with liberty to enter a non-suit if the Court should be of opinion that the Plaintiff ought not to have recovered.

Accordingly a rule *nisi* having been obtained for that purpose,

Bayley and *Onslow* Serjts. shewed cause. By the terms of the deed the Plaintiff was entitled to every privilege needful or necessary to the occupation or enjoyment of the way. From the covenant of the Defendant not to injure the pavement, it appears that it was intended that the way should be paved. The way itself is a long passage given to the proprietor of the house, for the more convenient use of his house, and as it was proved to be usual to put down a stone of this description, at the entrance to a house, it may be considered as the sort of pavement which is proper for that purpose. The word "needful" is a general term, and the construction must depend upon the subject to which it is applied. It was determined in *Senhouse* v. *Christian*, 1 *Term Rep.* 560. that the grant of a right of way for carrying coals along a particular slip of land, authorised the grantee to lay a framed waggon way; for the grantee was entitled to all privileges necessary to give such a road as it was the in-

1806.

GERRARD v. COOKE.

tention of the parties that he should have. Here the Plaintiff has done no more than is usual, and he could not have enjoyed his right of way so conveniently, unless he had done what he has, and he had a right to use it in the manner most convenient to himself, provided he did not thereby injure the grantor.

Williams and *Best* Serjts. *contrà*. Though it was proved that the flag-stone was convenient, it was not proved to be either needful or necessary to the enjoyment of the Plaintiff's right of way; and though where words are doubtful, the Court will construe them most strongly against the grantor, yet where the words are clear, they are not to be carried beyond their natural import. Thus in *Senhouse* v. *Christian*, though the Court thought that the grantee was entitled to make a framed waggon-way, because it was necessary for the conveyance of coals; yet they determined that he was not entitled to make a road across the slip of land, the grant being of a way along it. In Lord *Darcy* v. *Askwith*, *Hob.* 234. it was held that a demise by words, including coal-mines, did not authorise the lessee to cut timber for the use of the mines. In the case of *Hodder* v. *Holman*, 1 *Rol. Abr.* 391. it is determined, that if *A.* be seised in fee of a back side in a town, communicating with the *High Street* by a gate on the east; and also of a messuage and piece of land adjoining the back side on the north; and infeoff *B.* of the messuage and land, and grant free ingress, egress, and regress into and out of the premises, in, through, and over the gate and back side, *B.* cannot go to or from any other places to the street, without going to the messuage and land, for the grant is appurtenant to the premises; and it is also said in the same page, that if a man have a way over the close of another from *D.* to *Blackacre*, and then purchase land adjoining to *Blackacre*, he

1806.

GERRARD v. COOKE.

cannot use the way to the land adjoining, though he come first to *Blackacre*, and from thence to the land adjoining. In this present case the soil of the road belonged to the Defendant, and the Plaintiff, by putting down the flag-stone, which was not necessary to the enjoyment of his way, was guilty of an excess of the power granted to him; whatever was needful and necessary he was entitled to, and no more.

HEATH J. (*a*) I am of opinion that the Plaintiff is entitled to retain his verdict. This action is brought on a deed, by the terms of which it is competent to the Plaintiff to do any thing which is incident to the grant of a right of way. At common law the right to repair is incident to the grant of a way. The verdict is said to be contrary to the evidence, which was, that the way might be conveniently used without the stone, but not so conveniently. If the Plaintiff had repaired with gravel, it might in time have become a puddle; had he not, therefore, a right to lay this stone to repair it permanently? The case did not go to the jury, and we must therefore consider it upon the deed and the pleadings, and it appears to me, upon considering these, that it was competent to the grantee to repair the way in this manner. *Verba fortius accipiuntur contrà proferentem.*

ROOKE J. I am of the same opinion; and I agree with the proposition laid down at the bar, that the grantee may use the way in the manner which is most convenient to himself, if he does not thereby produce inconvenience to the grantor. I cannot think the verdict

(*a*) Sir James Mansfield Chief Justice, was absent from indisposition.

1806.

GERRARD v. COOKE.

CHAMBRE J. I quite agree in thinking that the verdict ought to stand. We ought to put a fair and reasonable construction on the words of the deed. This is nothing more than a grant of a way to which the right of repairing, when it becomes necessary or convenient, is incident. The particular words in question could have been inserted with no other view than rather to enlarge the right which the common law would give. I cannot confine the construction of the word "needful" to strict necessity, but think that it was intended to convey a reasonable and convenient privilege. The nature of the thing is material in considering the effect of the words. The way was granted for the occupation of a dwelling-house, and the grantee ought to have every thing needful for the occupation of his dwelling-house; he ought, therefore, to have the opportunity of repairing the way in such a manner that it should not be wet or dirty when he, or his family, or his visitors enter. If any inconvenience had been occasioned to the grantor, it might make a difference, but that is not the case here, nor is it to be feared that any right can hereafter be set up in respect of the soil, in consequence of this stone having been put down, for the precise extent of the road is pointed out. Under these circumstances, I think the construction contended for by the Defendant is too narrow and harsh, and that therefore the verdict ought to stand.

Postea to the Plaintiff.

1806.

ROGERS *v.* IMBLETON.

Feb. 3.

Declaration against the Defendant, for driving his cart against the Plaintiff's horse with force and violence, alleging it to have been done "by and through the mere negligence, inattention, and want of proper care," of the Defendant. On demurrer to this declaration, as not being in trespass, held that this declaration in case was good.

THE Plaintiff declared thus: "*Thomas Imbleton* the younger, was attached to answer *William Rogers*, in a plea, wherefore, whereas the said *William*, at the time of the committing of the grievance hereinafter mentioned, was lawfully possessed of a certain horse of great value; and the said *Thomas* was also, at the time of the committing of the said grievance, possessed of a certain cart, and a certain horse drawing the same, and then had the care, management, and driving of the said horse and cart of the said *Thomas*; nevertheless the said *Thomas*, well knowing the premises, whilst the said *Thomas* was driving the said cart and horse, and had his said cart and horse under his care and management, took so little and such bad care of the said cart and horse in driving the same, that the said cart, by and through the mere negligence, inattention, and want of proper care in the said *Thomas* whilst he was driving his said horse and cart, ran and struck against the said horse of the said *William* with such force and violence, that the said horse of the said *William* was thereby then and there very much hurt, bruised, and wounded, and afterwards died of the said hurts, bruises, and wounds; and whereupon the said *William*, by his attorney, complains, that whereas the said *William*, at the time of the committing of the said grievance hereinafter mentioned, to wit, on, &c. at, &c. was lawfully possessed of a certain horse of great value, to wit, of the value of 50*l.* and the said *Thomas* was then and there possessed of a certain cart, and of a certain horse then and there drawing the said cart, and then and there had the care, management, and driving of the said cart and horse; yet the said *Thomas*, well

1806.

ROGERS v. IMBLETON.

knowing the said premises, whilst the said *Thomas* was driving his said cart and horse, and had his said cart and horse under his care and management, to wit, on, &c. at, &c. took so little and such bad care of his said cart and horse, that the said cart, by and through the mere negligence, inattention, and want of proper care in the said *Thomas*, ran and struck against the said horse of the said *William* with such force and violence, that the said horse of the said *William* was thereby then and there very much hurt, bruised and wounded, and afterwards, to wit, on, &c. at, &c. died of the said hurts, bruises, and wounds; wherefore the said *William* says he is injured, and hath sustained damages to the value of 50*l.*; and wherefore, &c.

To this declaration the Defendant demurred, and assigned for causes that the said declaration contains the same allegations twice over, which is impertinent and nugatory. And also, for that the same contains no positive charge, but is merely by way of recital, and does not state the supposed grievance therein mentioned to have been committed with force and arms, or against the peace of our said lord the king; and also that the said declaration is in other respects uncertain, insufficient, and informal.

On this day the case was to have been argued by *Bayley* Serjt. for the Plaintiff, and *Shepherd* Serjt. for the Defendant.

The Court, however, intimated a clear opinion, that as the injury was expressly alleged in the declaration to have arisen from mere negligence, inattention, and want of care, the demurrer could not be sustained; but offered to allow the Defendant to withdraw his demurrer on payment of costs, and producing an affidavit of merits.

To this proposal *Shepherd* acceded, and declined to argue the case.

Sir

1806.

ROGERS v. IMBLETON.

Sir JAS. MANSFIELD Ch. J. then said, it is not to be considered that the case of *Leame* v. *Bray*, 3 *East* 593. is overturned by the present. At the same time I may say thus much, that upon a proper case it may be fit that the decision of the Court of *King's Bench*, in *Leame* v. *Bray*, should be reconsidered.

COOKE *v.* LUDLOW.

Feb. 3.

ASSUMPSIT for goods sold and delivered, and goods bargained and sold.

At the trial before *Chambre* J. at the *Guildhall* sittings after last *Michaelmas* term, a verdict was found for the Plaintiff, damages 12*l.* 6*s.* 6*d.*, subject to the opinion of the Court upon the following case. On the 23d *November* 1802 the Plaintiffs, who were partners and agricultural implement makers, received a letter by the post from the Defendant, dated *Winterbourne Court* near *Bristol*, in which he writes: "Three or four years since I had a patent chaff-cutter of you, which for some time answered my purpose very well, but it is latterly got out of order. I therefore beg the favour to send me another as soon as you can after you receive this, as I am in the habit of using a great deal of chaff: you will be so good as to send 2 or 3 pair of knives. Any conveyance by which it will reach *Bristol* will be convenient to me, as I am only six miles from it. I am," &c. And in a postscript to that letter the Defendant writes: "I will thank you for a line mentioning when you send the chaff-cutter, that I may know when to expect it, and where to send

A. in *London*, received an order from *B.* living in *Bristol*, to send goods to him by any conveyance which would reach *Bristol* (as *B.* lived only six miles from thence) informing *B.* when he sent them, that *B.* might know when to expect them; *A.* sent the goods to a wharf from whence vessels for *Bristol* sailed, and informed *B.* as he was told at the wharf, that the goods would come by the ship *Commerce*; in fact the goods were not sent on board the *Commerce*, which happened to be fully laden, but some time afterwards were sent by another vessel. *B.* after the arrival of the *Commerce* at *Bristol*, without the goods, made no further inquiry for the goods, and *A.* did not know till after he had required payment of the goods, that they had been sent by another ship, which he then communicated to *B.*—held that *B.* was liable for any loss of the goods.

1806.

COOKE v. LUDLOW.

for it; and the sooner I can get it the more agreeable, as I am much inconvenienced for want of chaff." On the 17th *December* following the Plaintiffs sent the chaff-cutter and knives, directed to the Defendant, to *Symonds'* wharf, *Tooley-street*, at which wharf some of the *Bristol* vessels load, and received from the wharfingers there a receipt of the same in the following words: "The *Commerce*, *Chas. Farquarson*, for *Bristol*, 17th *December* received 1*s.* 6*d.* *J. M.*" On the same 17th *December* the Plaintiffs *per* post advised the Defendant as follows:

E. Ludlow, Esq. *London*, 17th *Dec.* 1802.

Bought of *J. Cooke*, *Red Lion Square.*

One patent chaff-cutter - -	£11	11	0
One extra pair of knives - - -	0	17	0
Package and cartage 6*s.* Wharfage 2*s.* 6*d.*	0	8	6
(*Per* the *Commerce*, *Chas. Farquarson.*)			
23d. Two pair of knives - -	1	14	0
Per Lys. waggon	£14	10	6

SIR,

As above I have caused to be delivered, which I hope will be duly received. An early payment will oblige

E. Ludlow, Esq. Your most obedt. servt.

Winterbourne Court, near *Bristol.* *W. J. Cooke.*

The *Commerce* sailed from the port of *London* in *January* 1803 to *Bristol*, and arrived there, and *Pollard* and son are agents to all *Bristol* vessels loaden at *Symonds'* wharf for *Bristol*, and receive all the goods arriving by them. From the month of *January* 1803 until the arrival of the *Commerce* at *Bristol* the Defendant made continual inquiries of the agent and consignees at *Bristol* if she had brought the chaff-cutter in question. The package containing the chaff-cutter was not on board this vessel on its arrival at *Bristol*. It is the invariable custom at *Symonds'* and other wharfs, when goods are left there to go

to

1806.

COOKE v. LUDLOW.

to any place by a vessel, to give a receipt for the goods as going by the vessels then loading, without regard to the capability of the vessel loading to contain all the articles for which receipts are given; and if there are more goods than such vessel will contain, to load such goods as cannot be conveyed in such vessel on board the next vessel in turn that sails from the wharf. The *Commerce* was the vessel loading at the wharf at the time the chaff-cutter was delivered to the wharfinger, but such vessel was fully loaded with other goods in turn which came there before the chaff-cutter, so that the chaff-cutter and other goods delivered at the same time to be sent to *Bristol* were left out of that vessel, and were afterwards by the wharfinger put on board another vessel called the *Nancy*, which sailed from *Symonds'* wharf on the 13th *April* 1803 for *Bristol*, and duly arrived at *Pollard's* wharf with the chaff-cutter on board. The chaff-cutter was landed from the *Nancy* at *Pollard's* wharf, *Bristol*, and still remains there. The wharfinger did not give notice either to the consignor or to the consignee that the chaff-cutter had not been taken on board the *Commerce*, or that it had been sent by any other ship. No correspondence or communication whatever passed between the parties until about the middle of the following year (1804), when the Plaintiffs applied for payment of their demand, and in a short time afterward *viz.* on the 20th *July* in that year, received a letter from the Defendant, stating that he had not received any chaff-cutter whatsoever, though he had made repeated inquiries at *Pollard's* wharf for the same, from the receipt of the Plaintiff's invoice until the arrival of the *Commerce* at *Bristol* without the chaff-cutter, and therefore had got his old one repaired. On the 22d of *November* 1804 the Plaintiffs wrote to the Defendant, stating that they would not agree to sustain any loss, and informing him that by inquiry made that morning at *Symonds'* wharf they found that the chaff-cutter was not forwarded by the *Commerce*, but

1806.

COOKE v. LUDLOW.

but was put on board the *Nancy*, which left *London* on the 13th of *April* 1803; and that *Pollard* and Son on the quay at *Bristol* were the agents for that ship. This was the first intimation which the Defendant received from the Plaintiffs that the chaff-cutter had been sent by the *Nancy*.

The question for the opinion of the Court was, Whether the Plaintiffs were entitled to recover?

Shepherd Serjt. was to have argued on behalf of the Plaintiff, but the Court called upon the Defendant's counsel to begin.

Best Serjt. for the Defendant. In this case no such delivery was ever made of the chaff-cutter to the use of the Defendant, as will entitle the Plaintiff to maintain an action for it. The several cases which have been determined have gone no further than this, that if the vendee direct the vendor to send the goods by any particular carrier, a delivery to such carrier is a delivery to the vendee. But if the vendee chuse the carrier without any directions from the vendor, the vendee is answerable for the goods. The question is, whether a person in *London* who receives an order for goods for *Bristol*, satisfies that order by a delivery of the goods to a wharfinger in *London*. The vendee at *Bristol* has no control over the wharfinger in *London*, and has no means of looking after the goods. It is therefore more convenient that the vendor should be responsible for the acts of the wharfinger. In the present case the vendor gave notice that the goods were put on board one vessel, when in fact they were put on board another. The vendee therefore has been misled by the act of the vendor. Independent of which, the Plaintiff was guilty of neglect after he received information from the Defendant that the goods had not arrived, in not taking some steps sooner

to

1806.

COOKE v. LUDLOW.

to acquaint the Defendant with the conveyance by which the goods actually went.

Sir JAMES MANSFIELD Ch. J. This question does not depend upon the liability of particular persons to answer for the misconduct of the wharfinger. For it does not appear that any neglect is imputable to the wharfinger for not sending the goods by the *Commerce*. The single question is, whether the Plaintiff has reasonably complied with the order sent to him by the Defendant; and whether it be owing to the fault of the Plaintiff or the Defendant that the goods were not received. If the fault be imputable to the latter, he must pay the former the value of the goods. The Defendant in his letter of the 23d of *November* 1802 says, "any conveyance by which it will reach *Bristol* will be convenient; and desires to be informed when the chaff-cutter is sent, that he may know when to expect it, and where to send for it." The chaff-cutter being a heavy instrument was sent by water, and the Defendant could hardly suppose that it would be sent by land. On the 17th of *December* the Plaintiffs write to inform the Defendant that it is sent by the *Commerce*. The *Commerce* sailed in *January*, and after her arrival at *Bristol* the Defendant made frequent inquiries at *Pollard*'s wharf, from which he found that the chaff-cutter did not arrive by the *Commerce*. Under these circumstances he remains in perfect silence, and never informs the Plaintiffs until the 20th of *July* 1804 that it had not arrived. What then were the Plaintiffs to conclude? They had sent it by the proper conveyance to *Bristol*, and had written to the Defendant to tell him so. They must therefore suppose either that it had been received, or that they would have had information to the contrary. If the Defendant had informed the Plaintiffs that the chaff-cutter

1806.

COOKE v. LUDLOW.

cutter had not arrived by the *Commerce*, they might have inquired at the wharf and remedied the mistake; instead of this he leaves them in perfect ignorance, and under the supposition that it had been received; and it is not until application is made for payment in *July* 1804 that he gives any intelligence of the non-arrival of the article. In whom then is the fault? Not in the Plaintiffs. They sent the chaff-cutter to the wharf, and gave notice to the Defendant. The ship however being full, the chaff-cutter does not go by that ship, but according to all custom goes by the next to the same port, and the Defendant having information that it has been sent, does not acquaint the Plaintiffs of its non-arrival till a year and a half afterwards. If it had never arrived at all, it is very questionable whether the Defendant would not have been liable to pay for it, because it was his duty immediately to inform the Plaintiffs of its non-arrival. The article was sent in the common course, and it was the Defendant's own fault that he had it not. There is nothing to blame in the conduct of the Plaintiffs; they sent the chaff-cutter according to order, and it was the fault of the Defendant not to give notice in due time that he had not received it.

HEATH J. It is not necessary to add much. I do not consider the wharfinger as in any degree the agent of the Plaintiff; he is the agent of the Defendant, by whose order and direction the goods were sent. No negligence is imputable to the Plaintiffs in not inquiring after the goods. They had no notice of the non-delivery until *July* 1804. Nothing is more common than in the case of waggons, where one is full, to send the goods by the next.

ROOKE J. I am of the same opinion. The Plaintiffs in this case have done every thing which they were bound to

to do, and the Defendant was guilty of gross negligence in not giving earlier notice.

1806.

COOKE v. LUDLOW.

CHAMBRE J. I am entirely of the same opinion.

Postea to the Plaintiffs.

WRIGHT v. BOND.

Feb. 3.

THIS was a case sent by the Lord Chancellor for the opinion of the Judges of this Court.

Thomas King being seised in fee according to the custom of the manor of *Stoke Newington* in the county of *Middlesex*, of the moiety of certain copyhold premises, part and parcel of the same manor which had been by him previously surrendered to the use of his will, according to the custom of the said manor, by his will duly made and dated the 12th of *March* 1741, devised as follows: "I give to my loving mother *Mary King* of the said parish of *Newington* all that house or tenement standing and being in *Newington* aforesaid, near to the *Three Crowns*, with the appurtenances thereto belonging, and now in the occupation of the widow *Emms*, and she the said house to enjoy during her life, and after her decease to the eldest son of *Edward King* of the county of *Bedfordshire:* and if the said *Edward King* should have no male heir, then to the son of *John King* of *Sunden* in the

A. devised a house to his mother for life, and after her death "to the eldest son of *E. K.* and if *E. K.* should have no male heir, then to the eldest son of *I. K.*" he also devised copyhold lands "to the eldest son of *E. K.* but if the said *E. K.* aforesaid should have no male heir, then my will is that the aforesaid lands and tenements I bequeath to the aforesaid son of *I. K.* to him and his heirs for ever." But if the said eldest son should offer to sell or mortgage such copyhold lands and tenements aforesaid, then he gave the aforesaid lands and tenements to *T. C.* in fee. He then gave his personal estate to *T. C.* directing him "to be at the charges of taking up and admitting the said eldest son as afore-mentioned to the said copyholds out of the said personal estate, and in the name of the said *K.*" He then gave the rents and profits of the copyholds to *T. C.* for seven years, and then "to the afore-mentioned eldest son. But if the said *T. C.* should die before the end of the seven years, then the aforesaid eldest son of the *K's* to take and enjoy the said estate forthwith to them and their heirs for ever." Held that the eldest son of *E. K.* took an estate in fee under this will in the copyhold premises.

1806.

WRIGHT v. BOND.

county aforesaid. I also give and bequeath to the eldest son of *Edward King* yeoman, living in the county of *Bedfordshire*, all my copyhold lands and tenements lying and being in the parishes of *Stoke Newington* and *Hornsey* in the said county of *Middlesex*: but if the said *Edward King* aforesaid should have no male heir, then my will is that the aforesaid lands and tenements I bequeath to the eldest son of *John King* yeoman, living in the parish of *Sunden* in the aforesaid county of *Bedford*, to him and his heirs for ever. But if the said eldest son should offer or endeavour to sell or mortgage such copyhold lands and tenements aforesaid, then my will is that the aforesaid lands and tenements, upon sufficient proof as aforementioned, I bequeath to my kinsman *Thomas Conway* of *Stoke Newington* aforesaid, him to enjoy and his heirs for ever. I also bequeath to my kinsman *Thomas Conway* aforesaid all my personal estate, both in stock and debts, which shall be then due to me at my decease, he paying out of such personal estate my funeral charges, and what just debts soever I owe at the time of my decease, and also to be at the costs and charges of the court of the said several manors of taking up and admitting the said eldest son as aforementioned to the said copyhold lands and tenements out of the said personal estate, and in the name of the said *King*. But that he the said *Thomas Conway* shall for the first 7 years to come after my decease receive and enjoy the rents and profits of the abovementioned copyhold lands and tenements, and after the expiration of the said 7 years then to the aforementioned eldest son. But if the said *Thomas Conway* should depart this life before the expiration of the said term of 7 years, then the aforesaid eldest son of the *King's* to take and enjoy the said estate forthwith to them and their heirs for ever." Shortly after making the said will the said *Thomas King* died, leaving the same unrevoked, and *Edward King* the younger, the eldest son of the said *Edward King* named

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in the said will, was, at a court holden of the said manor on the 19th *May* 1743, duly admitted in his proper person to the said copyhold premises as devisee of the said *Thomas King*, to hold to him and his heirs. *Edward King* the younger died in 1756, leaving an infant son named *John King*, who was duly admitted as heir to his father to the said copyhold premises; to hold to him and his heirs, at a court holden for the said manor on the 10th of *August* 1757, being then of the age of 7 years, by *Edward King* the elder, his grandfather; and on the 21st of *May* 1789 the last-mentioned *John King* duly surrendered the said premises to the use of *Joseph Wright*, his heirs and assigns for ever, who at the same court was admitted tenant thereof accordingly.

The question for the opinion of the court was, What estate the eldest son of *Edward King* the elder took under the said will of the said *Thomas King* in the copyhold premises in question?

Lens Serjt. for the Plaintiff. I contend that the eldest son of *Edward King* took an estate in fee under the will. The words "to him and his heirs for ever" must be understood as equally applicable to the eldest son of *Edward King* in case he should take, as to the eldest son of *John King* in case he should take. The testator intended that one of them should have his estate, and that whoever took it should have it in fee. Had it been his intention that the first should take for life and the second in fee, the will would have been differently worded, and the estate would have been given to the eldest son of *E. K.*; but if *E. K.* should depart without male heir, then to the eldest son of *J. K.* and his heirs for ever. Besides, it appears from other parts of the will that it was the intention of the testator to give an estate in fee to the eldest son which should take. First, the testator declares, that if the said eldest son, without distinguishing between the

son

1806.

WRIGHT v. BOND.

son of *E. K.* and the son of *J. K.*, shall offer to sell or mortgage, the estate shall go over; next after directing *T. Conway* to pay certain charges out of the personal estate, and particularly the charges of admitting the said eldest son to the copyholds in the name of the said *King*, he directs, that *T. Conway* as a compensation should enjoy the rents and profits of the copyholds for 7 years; and that after the expiration of 7 years they should go to the aforementioned eldest son; but if *T. Conway* should die before the end of 7 years, then the aforementioned eldest son of the *King's* should take and enjoy the estate forthwith to them and their heirs for ever. The only difficulty in this case arises from the length of the first sentence. But if the whole devise to the eldest son of *E. K.* and the eldest son of *J. K.* be only one sentence, then the words "to him and his heirs for ever" will apply to both. In 1 *Roll. Abr.* 844. line 30. it was held, "that if a man devise *Black-acre* to one in tail, and also *White-acre*, the devisee shall have an estate tail in *White-acre* also, for it is all one sentence, and the words of limitation go to both.

Shepherd Serjt. for the Defendant. The eldest son of *Edward King* took only an estate for life. The testator seems to have known in what terms to give an estate in fee, for he first gives to the eldest son of *E. K.* without words of limitation, and afterwards to the eldest son of *J. K.* and his heirs for ever. It is impossible so to construe the devise as to make the words "to him and his heirs for ever" apply to the eldest son of *E. K.* There is no distinction between saying "to the eldest son of *J. K.* and his heirs for ever," and "to the eldest son of *J. K.*, to him and his heirs for ever." The addition of the words "to him" rather strengthens the application of the words of limitation to the eldest son of *J. K.* The devise therefore is "to the eldest son of *E. K.*, and

if

if *E. K.* have no male heir, then to the eldest son of *J. K.* and his heirs for ever. The only ground, therefore, upon which it can be made out, that an estate in fee is given to the eldest son of *E. K.* must be by incorporating the latter words of the will "to them and their heirs for ever," with the first devise. But this cannot be done without a strong apparent intention. In *Roe ex dem Bowes* v. *Blackett, Cowp.* 240. it is said, "in order to make a devise of lands, without any limitation added, a fee, such an intention must appear as is sufficient to satisfy the conscience of the Court in pronouncing it such. If it is barely problematical the rule of law must take place." The latter part of the will does not shew an intention that the eldest son who should come into possession of the estate, should hold it in fee. For the words there used apply only to the event of *T. Conway* dying within 7 years. Whatever ground, therefore, they might afford for giving an estate in fee to the eldest son of *E. K.* upon the event of *T. Conway* dying within 7 years, they afford no ground for construing the first devise, which is to take place at all events as a devise in fee.

Sir JAS. MANSFIELD Ch. J. This case comes from the Court of Chancery. The opinion of the Court, therefore, is not to be delivered in public, but will be certified to the Lord Chancellor. It is usual, however, to state the reasons upon which the certificate is to be founded. Taking all the parts of this will together, imperfect as they are, it is impossible not to see that when the testator uses the singular number, he so far means the plural, as to apply it to the son either of *Edward King* or *John King*, according as the event may happen. The question then is, whether having given an estate of inheritance to one, he must be considered as having given it to both. I need not repeat the first clause of devise, the

1806.

WRIGHT v. BOND.

latter part of which, after giving the estate to the eldest son of *John King*, immediately concludes with these words, "to him and his heirs for ever." If this clause had stood alone it would have been very difficult to make out that the eldest son of *Edward King* took an estate of inheritance, for the word "him" being a relative term, must relate to the eldest son of *John King*. Considering the other parts of the will, however, it may be fairly argued that he meant more by these words than they seem to import when taken alone. He goes on, "if the said eldest son shall offer to sell or mortgage." There he certainly means both. In the event then of either of these persons offering to sell, he gives an estate in fee to *T. Conway*. This would be a void devise if he had not given an estate of inheritance to these persons. He then directs the expence of admitting the eldest son as aforesaid to the copyhold lands, and in the name of the said *King*, to be paid by *Conway* out of the personal estate. What does he mean, but that eldest son which will be entitled, that is, either of the two sons, as the event shall be. Then after giving the rents and profits to *Conway* for the first 7 years, he says, "then to the aforementioned eldest son; but if *Conway* should die within 7 years, then the aforesaid eldest son of the *Kings* to take." This clearly shews that the words "eldest son" must refer to both, for there could not be one eldest son of two men. And he concludes, "to take and enjoy the said estate forthwith, to them and their heirs for ever." If then by the eldest son of the *Kings* he meant that one of two persons who should be entitled to take according to the event, when he adds, "to them and their heirs for ever," he must be considered as giving an estate in fee to each. The only way to get rid of this construction is to confine the estate to the event of *Conway* dying within 7 years. But this would be a most whimsical construction. The clear meaning was that *Conway* should have

have the estate for seven years, and subject to that the eldest son of *Edward King* or of *John King*, should have it. He did not mean that any person coming after *Conway* should have any benefit, and therefore he inserts a provision with respect to *Conway's* death within 7 years. I am clearly of opinion, that this was a gift to the eldest sons of the two *Kings*, first to one and then to the other, as the event should turn out. That *Conway* was to have the rents and profits for 7 years, and subject to that the estate was to go to the eldest son of *Edward King* or the eldest son of *John King*, according to the event, in fee.

HEATH J. I agree with my Lord Chief Justice both in the comments which he has made on this will, and the interpretation which he has put upon it.

ROOKE J. I am of the same opinion.

CHAMBRE J. I am of the same opinion.

The following certificate was afterwards sent to the Lord Chancellor.

Having heard the arguments of counsel on both sides, we are of opinion that the eldest son of *Edward King* the elder took under the will of the said *Thomas King* an estate in fee simple in the copyhold premises in question, subject to such estate and interest (if any) as the said *Thomas Conway* took therein for the first seven years after the testator's death.

J. MANSFIELD.
J. HEATH.
G. ROOKE.
A. CHAMBRE.

1806.

Feb. 5.

Defendant was served with a writ styling him 'John;' he did not appear, but Plaintiff entered a common appearance for him, and declared against him conditionally by the name of "William sued by the name of John:" held irregular.

GREENSLADE *v.* ROTHEROE.

THIS was an application to set aside proceedings, for irregularity, the Defendant having been served with a writ styling him "*John*," and afterwards declared against by the name "of *William* sued by the name of *John*." The Defendant had not appeared, but the Plaintiff entered a common appearance for him, and filed the declaration conditionally in the office.

Cockell Serjt. shewed cause, and admitting that in the case of *Doo* v. *Butcher*, 3 *Term Rep.* 611. a similar blunder had been held fatal by the Court of King's Bench, observed, that in *Symmers* v. *Wason*, 1 *Bos. & Pull.* 105. this Court had come to a contrary determination.

Williams Serjt. in support of the rule, urged that in *Symmers* v. *Wason*, the Plaintiff had not as in this case entered a common appearance for the Defendant, whereas the case of *Doo* v. *Butcher* was a precise authority in point for the Defendant.

The case stood over till the next day, when Sir *James Mansfield* Ch. J. said, the case of *Doo* v. *Butcher* being precisely in point, had great weight with him, though not inclined to favour such objections, and observed, that as the Defendant had not been served with the writ by his right name, he could not be deemed in law to have been served at all, and that such want of service could not be cured by the declaration being filed against him by his right name.

Rule absolute.

1806.

INMAN *v* HUISH.

Feb. 6.

A *testatum capias* having been made returnable on a day certain instead of a general return-day, was held irregular. And the Court refused to amend it on account of the bail.

THIS was a rule to shew cause why proceedings should not be set aside for irregularity.

The Plaintiff having issued a *testatum capias* out of *London* into *Middlesex* with an *ac etiam* clause for 50*l.* on promises, returnable on the last day of *Michaelmas* term, and indorsed for bail 19*l.* and upwards, arrested the Defendant, who gave a bail-bond to the sheriff, and in this term obtained a rule to shew cause why the proceedings should not be set aside on account of the *capias* being returnable on a day certain instead of a general return day.

Shepherd and *Bayley* Serjts. shewed cause. The object of the *capias* being merely to bring the party into court, as soon as the party has appeared all defect in the process is cured; at least no such defect could be taken advantage of upon writ of error; and it should seem that the Court will not set aside proceedings for irregularity upon such an objection as this, for in *Elmes* v. *Tomlinson*, *Barnes*, 230. where a writ of inquiry in a proceeding by bill was returnable on a general return-day, the Court refused to set it aside, though it ought to have been on a day certain. There is no reason however why a *capias* should not be returnable on a day certain. Original writs which issue out of the Court of Chancery returnable in another Court are made returnable on general return days, because it is unknown to the Court of Chancery what days may be convenient to the other Court for the return, but there is no reason why judicial writs, which are returnable in the Court which issues them, should not be made returnable on a day certain, because that Court must know what days are convenient to itself. The reason why writs of *capias* have been made returnable on general

1805.

INMAN v. HUISH.

return days probably was this, that a judge, together with a clerk of the essoins, formerly sat upon the general return days when essoins might be cast in personal actions, and if no essoin was cast a *ne recipiatur* was entered on the next day, for which purpose a particular officer probably attended; if therefore process was not returnable on a general return day, there might be no clerk to receive the Defendant's excuse; but no possible inconvenience can now arise from making a *capias* returnable on a day certain. The *capias* presumes an original writ to have issued out of Chancery for a trespass *quare clausum fregit*, and upon such an original the Plaintiff may either proceed by *distringas* or *capias*. Now a *distringas* is always returnable on a day certain, so that all process which presumes an original out of Chancery is not returnable on a general return day, and there is no reason therefore why the return of the *capias* should not be regulated by the convenience of the Court. Writs of *latitat* in the King's Bench are always returnable on days certain, and it would be of material advantage to the suitors of this Court that writs of *capias* should be made returnable in the same manner. It is desirable that the Courts of King's Bench and Common Pleas should stand upon an equal footing, and though the Court cannot alter the law for the sake of obtaining that end, yet in matters of practice which are subject to their discretion they will adopt such rules as are best calculated to produce that effect: such was the opinion of Mr. Justice *Buller* in *Davis* v. *Owen*, 1 *Bos. & Pull.* 342. With respect to the statutes of the 32 *Hen.* 8. *c.* 21. 16 *Car.* 1. *c.* 6. and 24 *Geo.* 2. *c.* 48. for the alterations of the terms, although they provide what days shall be general return days, they do not direct that a *capias* shall be returnable on one of those days. There is no instance of any writ of *capias* having been set aside on the ground of its having been made returnable on a day certain.

Best

1806.

INMAN v. HUISH.

Best Serjt. *contrà* relied on the uniform established practice of the Court, contending that however reasonable it might be to make a new rule for the future, the ancient practice must be considered as having settled the law. He relied on the stats. *Hen.* 8. *Car.* 1. and *Geo.* 2. which provide that all common writs and processes which should thereafter be returnable in *Trinity* or *Michaelmas* terms should be made returnable on the days there specified provided that in such cases and processes in which special days had been used to be appointed, it should be lawful for the Court to appoint special days of return as should be thought convenient. That as a *capias* was a process in use at the time of those statutes, and had always been made returnable on a general return day, the Court were bound to make it so returnable.

Cur. adv. vult.

On this day Sir JAMES MANSFIELD Ch. J. said: This being an experiment not sanctioned by any order of the Court, we think we ought not to alter the practice upon this motion. Whether we may think fit to make any alteration hereafter we do not say. That will be matter of consideration. At present the rule must be made absolute.

Bayley then moved for leave to amend the return, urging that there was an original writ to amend by.

But it being objected that the bail would be affected by such amendment, *the Court* refused to allow it.

1806.

Feb. 6.

Negligence in the conduct of a cause cannot be set up as a defence to an action on the attorney's bill. At least unless it was negligence such as to deprive the Defendant of all possible benefit from the cause. Quære. Whether even in such case it can be used as a defence?

TEMPLER, Gent. one, &c. *v.* M'LACHLAN.

THIS was an action by an attorney to recover the amount of his taxed bill in a suit in this Court of *M'Lachlan* v. *Gardiner*. The defence was gross negligence in the Plaintiff in not having opposed the justification of the persons who were put in as bail, and the circumstances of the case were as follow. *Gardiner* the Defendant being arrested, and not being able to procure bail, remained for some time in custody, but at length notice of putting in and justifying bail was given by him, the bail justified without any opposition, and the Defendant was discharged from prison. The cause, *M'Lachlan* v. *Gardiner*, was tried, and the Plaintiff obtained a verdict for 60*l.* and judgment thereon. *Gardiner* however having run away, and one of the bail not being to be found, and the other being too poor to pay the debt, or any part thereof, the Plaintiff could not obtain the fruits of this verdict and judgment; and upon making some inquiry of the Plaintiff as to his conduct in this business, and with respect to the bail he had permitted to pass, the Defendant received a letter from him, in which was the following passage: "I had not nor have now a good opinion of the "bail, and on that account compelled them to justify in "open Court, which they did." It was admitted however that the Plaintiff's negligence in not opposing the bail in open Court had been the cause of their being permitted to pass, as they could not have justified if they had been opposed, being persons of a very low description. Some of the items of the Plaintiff's bill consisted of charges incurred by proceedings against the bail, which had proved fruitless. It appeared from some letters which had passed between the Plaintiff and Defendant, that the latter had made inquiries about the expence of proceeding against the bail, and after he was informed of their insufficiency,

1806.

TEMPLER v. M'LACHLAN.

ciency, did not make any answer to an inquiry by the Plaintiff whether he was to proceed or not against the bail. Under these circumstances Sir *James Mansfield* Ch. J., before whom the cause was tried at the *Guildhall* sittings after last *Michaelmas* term, was clearly of opinion that the Plaintiff was entitled to recover for such charges as had been incurred in the proceedings against the bail, as the Plaintiff might infer from the Defendant's silence when his directions were asked, that proceedings were to be instituted against the bail; and also gave it as his opinion, that however the conduct of the Plaintiff might be the ground of an action for negligence, still that negligence could not be set up in answer to the Plaintiff's demand upon his bill. Accordingly the Plaintiff obtained a verdict for the amount of his bill; but liberty was reserved to the Defendant to move to enter a nonsuit, or to have the verdict reduced so much as covered the proceedings against the bail.

A rule *nisi* having been obtained in that shape on a former day,

Shepherd Serjt. now shewed cause. The great question in this case is, whether, supposing the Plaintiff to have been guilty of negligence, that negligence is an answer to his action on his bill? In a case of *Mills and Others* v. *Baimbridge*, which was tried before Lord *Ellenborough*, and was an action for the freight of goods, the defence attempted was, that the Plaintiffs had injured the goods by the mode in which they had stowed them, and that, therefore, they could not recover for their freight. Lord *Ellenborough* held, that the injury sustained by the goods in consequence of their improper stowage could not be made use of as a defence to the demand for freight, though such injury was the ground of another action by the Defendant against the Plaintiffs. The present case however is not with respect to the injury analogous to

1806.

TEMPLER v. M'LACHLAN.

that of the goods spoiled, for the Defendant here has obtained his judgment in the suit in which the Plaintiff was employed, and the only injurious consequence which has resulted from his negligence is, that the Defendant lost the advantage of keeping *Gardiner* in prison by persons becoming his bail who were not responsible. This consequence is injurious at present, but hereafter it may cease to be so; *Gardiner* may return and be compelled to pay the debt, and shall it be allowed to the Defendant hereafter to obtain all the benefit of his suit against *Gardiner* at the expence and trouble of the Plaintiff, and yet repay him no part of that expence, nor remunerate him for his trouble, because at the time he puts his bill in force the Defendant's benefit, from his suit against *Gardiner*, is postponed? This shews the danger of admitting the negligence of the attorney to be set up as an answer to the demand on his bill; for if in one case negligence be an answer, it must be so in all cases without regard to the degree of injury sustained by the person availing himself of that negligence as a defence.

Best Serjt. in support of the rule. It is rather an extraordinary proposition to maintain that an attorney can recover the amount of his bill in a suit which he has rendered ineffectual by his own negligence. Suppose an attorney expressly to undertake to conduct a cause with skill, could he demand payment of his bill unless he could shew that he had conducted the cause with skill? Now the implied contract of every attorney who undertakes to conduct a cause is, that he will conduct it with skill, and in law there is no difference in the consequences resulting from express and implied contracts. In *Mulloy* v. *Backer*, 5 *East*, 322. which was an action for passage money *pro rata itineris*, the voyage not having been completed in consequence of a capture, Lord *Ellenborough* says, "if this were the case of a contract to be decided only according

cording to the law of *England*, without adverting to any rule drawn from the marine law, it would be the case of a contract undertaken but not performed, and consequently the Plaintiff could not be entitled to recover his wages or hire, as for a partial performance of it *pro rata*." This is the case of an implied contract to conduct a cause with skill to the end, and the cause has not been conducted with skill. Put the case of a medical man not doing that for a patient which a person of medical knowledge would have done, and in consequence the patient injured, would not such ignorance or negligence afford a good defence to a demand for payment as if the patient had been properly attended (*a*)?

Sir JAMES MANSFIELD Ch. J. I was of opinion at the trial, and I still continue to think, that the Plaintiff in this action is entitled to recover. But in declaring this to be my opinion. I do not go the length of saying that in no case of this kind can negligence in the party suing be used as a defence to the action, though I think it can only be used where the negligence has been such, that the party for whom the work was done has thereby lost all possibility of benefit from such work. Now that cannot be said in the present case, since a judgment has been obtained for the Defendant, and its fruits may possibly hereafter be had by him. Indeed, if no negligence had occurred on the part of the Plaintiff, a surrender of *Gardiner* would have been the utmost that the Defendant could have expected, and consequently his only loss is that of having had the body of his debtor in custody. I do not see therefore, how we can prevent the Plaintiff's recovery in this action, or introduce his conduct in the suit against *Gardiner* into this cause, so as to reduce the amount of his demand. If the Defendant had been nonsuited in the action against *Gardiner* through the mere

(*a*) *Vid. Dickon* v. *Clifton*, 2 *Wils.* 319.

negligence

1806.

TEMPLER v. M'LACHLAN.

negligence of his attorney, or had wholly lost the fruit of his proceeding, I should have been very unwilling to allow him to recover the amount of his bill. Yet even in such a case there would be great weight in the argument that a Plaintiff who sues upon his bill, does not come prepared to prove any thing more than the business done, and is not in a situation to meet a charge of negligence. In modern times the law has been very rigid in its rules with respect to the shape in which such defences shall be brought forward, nor do I think it at all surprising such rules should have been adopted. Hitherto it certainly has been the received opinion, that negligence cannot be used as a defence in such an action as the present, and therefore without inquiring whether negligence may not possibly be attended with such consequences as may in some future case vary the rule, still I think this Plaintiff entitled to recover.

HEATH J. I am of the same opinion. It is perfectly clear as a rule of practice that negligence cannot be set up as a defence in such an action as the present; and though the rule may sometimes press hard upon a party, still upon the whole I think it better to adhere to the rule. The argument drawn from the case of an express contract does not apply, because there the condition precedent to the Plaintiff's recovery must be proved by him. In this case the Plaintiff would have no intimation of the defence intended to be resorted to.

ROOKE J. This is not a question of fraud, or of such gross negligence as has deprived the Defendant of all the fruits of his proceeding against *Gardiner*, and therefore I think it cannot be used as a defence. At the same time I would observe, that had there been a cross action by the Defendant against the Plaintiff, I should have concurred in an application to the Court to stay the execution in this action, pending the other.

CHAMBRE

1806.

TEMPLER v. M'LACHLAN.

CHAMBRE J. I think this attempt a mere experiment, the mischievous consequences of which, if successful, have been well pointed out. Certainly it would be a constant source of surprise to parties, and the extent of inquiry into which Courts would be led by it would be endless. In this case, if no negligence had occurred, the Defendant could have had nothing but the body of *Gardiner*, which would have been no very great satisfaction. The only reason which could induce the Courts to let in such a defence, would be the hope of preventing a multiplicity of actions. But in that view, if we entertained it, I think we should be deceived.

Rule discharged.

CRAUFURD *v.* PHILLIPS.

Feb. 10.

If the consideration of an annuity be paid to the agent of the grantor, the name of such agent need not be inserted in the annuity deed. And if the consideration be alleged in the deed to have been paid on a particular day, on which day it was paid to the common agent of both parties, who were at a distance from each other, and by him paid over in a few days afterwards to the grantor on his executing the deed, this is a sufficient allegation of the time of payment within the 17 *Geo.* 3. *c.* 26.

DEBT on bond, dated 4th of *July* 1798, for 2100*l.* The Defendant craved *oyer* of the bond and of the condition, the latter of which recited that *William Lemon* had agreed with the Plaintiff for the sale of an annuity for the joint lives of the said *William Lemon* and the Defendant, and that in pursuance of the said agreement, the Plaintiff, on the day of the date of the bond, had paid to the said *Wm. Lemon* the sum of 1050*l.* and that the said *Wm. Lemon* had agreed to give security for payment of the annuity. The condition was for payment of the annuity by quarterly payments, on the 4th of *October*, 4th of *January*, 4th of *April*, and 4th of *July*.

The Defendant pleaded first, *Non est factum*; 2dly, the stat. 17 *G.* 3. *c.* 26. *s.* 2. by which it is enacted among other things, that in every deed, instrument, or other assurance, whereby any annuity or rent-charge should, from and after the passing of the said act, be granted, or attempted to be granted, the consideration really and *bona fide*, which should be in money only, and also the name or names

1806.

CRAUFURD v. PHILLIPS.

names of the person or persons by whom, and on whose behalf the said consideration, or any part thereof, should be advanced, should be fully and truly set forth and described in words at length; that in case the same should not be fully and truly set forth and described, every such deed, instrument, or other assurance, should be null and void to all intents and purposes; and averred, that the consideration of granting the said annuity mentioned in the condition, was not truly set forth and described in the said condition, but was untruly set forth and described in this, namely, that the consideration is described to have been the sum of 1050*l.* paid by the Plaintiff to the said *Wm. Lemon* on the 4th of *July* 1798. whereas, in truth and in fact, the said sum of 1050*l.* was not paid by the Plaintiff to the said *Wm. Lemon* on the 4th of *July* 1798, nor until several days, to wit, five days after the said 4th of *July* 1798, and this, &c. wherefore, &c. Plaintiff joined issue on the first plea, and to the second replied, that before the executing the bond by the Defendant, to wit, on the 29th of *June* 1798, the said sum of 1050*l.* being the consideration of the granted annuity, was paid by the Plaintiff to one *Thomas Harvey*, being the agent as well of the Plaintiff as of the said *William Lemon;* and that the said sum, or any part thereof, was not at any time after the payment thereof to the said *Thomas* as aforesaid returned to, or under the control of the Plaintiff, nor did the Plaintiff derive any benefit or advantage therefrom whatsoever. That after the said sum had been so paid to the said *Thomas Harvey* as aforesaid, to wit, on the said 4th day of *July*, the Defendant at *Caermarthen* executed the bond in the presence of the said *Thomas Harvey*, being such agent as aforesaid, at which time the said *William Lemon* was at a great distance from *Caermarthen*, and that afterwards, and within five days after the executing of the said bond by the Defendant as aforesaid, to wit, on the 8th of *July* 1798,

1798, the said bond was duly executed by *William Lemon*, and the said sum of 1050*l.*, being the consideration of granting the said annuity as aforesaid at the time of the executing of the said bond by the said *William Lemon*, was paid over by the said *Thomas Harvey* to the said *William Lemon*, to the use and behoof of the said *William Lemon*, that the delay which took place between executing the bond by the Defendant and by *William Lemon* did not take place by the default, contrivance, or procurement of the Plaintiff; and that the said sum of 1050*l.* was ready to be paid over, and would have been paid over to the said *William Lemon* on the said 4th of *July*, if the said *William Lemon* had then executed the said bond, and this, &c., wherefore, &c.

1806.

CRAUFURD v. PHILLIPS.

To this replication the Defendant demurred.

Praed Serjt. in support of the demurrer. There are two objections in the case. First, that the name of the agent by whom the consideration was paid is not stated in the deed; and secondly, that the day on which it was paid is untruly stated. As to the first, it appears by the replication that the consideration was paid to *Lemon* by *Harvey*, the latter being the agent of the Plaintiff as well as of *Lemon*, the name of *Harvey* therefore ought to have been stated in the condition of the bond, whereas the condition stated the money to have been paid by the Plaintiff. The money was deposited in the hands of *Harvey*, to be paid to *Lemon* when he should have executed; and if the Defendant had died before *Lemon* had executed, the payment might have been stopped. [*The Court*, intimated a clear opinion that this objection could not be supported, saying, that a payment to *Harvey* was a payment to *Lemon*, and that the act did not require the name of the person to whom the money was paid to be inserted in the deed; and that with respect to the right to recover the money from *Harvey* if the Defendant had

1806.

CRAUFURD v. PHILLIPS.

died before *Lemon* had executed, the Plaintiff would have been equally entitled in that case to recover it from *Lemon* himself if the money had been paid to him.] With respect to the second objection, the time when the purchase money is to be paid is a material ingredient in the consideration, and ought therefore to be fully and truly set forth. Whether the purchase money be paid immediately or at a future day will make a great difference to the grantor, and must affect the price of the annuity. It is impossible to make a distinction between a delay of payment for a few days only, as in this case, or for a longer period. If this consideration be truly stated within the meaning of the act, it might as well be said to be truly stated if it had been agreed that payment of the purchase money should be delayed until the first quarterly payment of the annuity became due. Lord *Kenyon* in *Rumball* v. *Murray*, 3 *Term Rep.* 298. said, that the annuity act was an extremely remedial law, and the Court therefore ought to give effect to every word of it in order to meet the mischiefs intended to be remedied. It was therefore determined in that case, that if the consideration be paid in notes, they must be set forth in the memorial, though the act does not require in express terms that the mode of payment shall be set forth. And in *Berry* v. *Bentley*, 6 *Term Rep.* 690. where the consideration was paid by a promissory note, it was determined not only that the memorial must state that it was paid by such note, and that the amount had since been paid, but also the time when such note became payable. In *Glasse* v. *Mount*, 7 *Term Rep.* 390. where the consideration was paid by an agent of the grantee, it was held necessary to state in the deed the name of such agent, though in point of law payment by the agent was payment by the principal. It must be admitted indeed that the cases of *Coare* v. *Giblett*, 4 *East*, 85. and *Phillips* v. *Craufurd*, 9 *Ves. jun.* 214. before the Master of the Rolls, have determined this point against

the

the necessity of setting forth the day of payment. However it may be observed, that in the case of *Underhill* v. *Horwood*, 10 *Ves. jun.* 209. which arose out of that of *Coare* v. *Giblett*, the Chancellor expressed himself much dissatisfied with the decision of the King's Bench, saying, "the time of payment is of itself a circumstance extremely material to the value of the consideration, and it is of no consequence that in this instance the difference was but two days, for the question is not upon the particular circumstances of any case, but whether in general the time is essential in ascertaining the value of the consideration, and the decision upon this small interval of time in this instance must regulate the decision, if an interval of 12 months had elapsed." His Lordship said, he wished the point to be re-considered, and directed some of the actions which had been brought to be tried in order to raise this among other questions. The present case arises out of that of *Phillips* v. *Craufurd*, decided by the Master of the Rolls, and the object of the demurrer is to bring that decision under the consideration of this Court.

Bayley Serjt. *contrà* was stopped by the Court.

Sir JAMES MANSFIELD C. J. There is nothing said in the act respecting the day of payment. The statute itself being a new provision in the law by which certain instruments are made void, if they do not comply with particular requisites therein specified, it would be too much for the Court to add to those particulars which the legislature has said shall have the force of avoiding certain instruments, another particular not mentioned in the act. The only ground upon which this point has been argued is, that the act having required the consideration to be fully stated, this necessarily involves a requisition to state the time of payment; but this argument does not strike me to be well founded, the consideration is one thing,

1806.

CRAUFURD v. PHILLIPS.

and the time of payment is another. An artificial argument might indeed be raised on the supposition of the purchase money being detained for so long a time as to make a variation in the value of the consideration; but that is not this case. In the present instance, the money in common understanding must be considered as having been paid on the 4th of *July*, when it was paid into the hands of *Harvey*, the agent of *Lemon*. The money, therefore, was substantially paid on the 4th of *July*; it cannot be said that the consideration was lessened by getting a few days later into the hands of *Lemon*, and there is nothing in the act which prevents payment to the agent of the receiver from being considered as a payment to him. It is provided, that the name of the person who pays the money shall be stated in the deed, and the interpretation has been, that where the money has been paid by an agent, it cannot be stated as a payment by the principal; but there is nothing which makes it necessary to state the agent who receives the money. In all transactions whatsoever, payment to the agent is payment to the principal. I think, therefore, that the case of *Coare* v. *Giblett* was rightly decided, as well as this case when before the Master of the Rolls, and there is no ground for this Court to overturn those decisions.

HEATH J. I am of the same opinion. I think that the case of *Coare* v. *Giblett* was rightly decided. What has a person to do more than to look into the act of parliament. If he complies with it he has a right to consider the annuity as valid; but now it is said that this is not all, but that he must consider what the act substantially requires. The act makes no mention of the time of payment; and if a person were bound to go beyond the provisions of the act, no one would be safe in purchasing an annuity. The act is strict, and requires many things to be done which it is difficult enough to comply with.

Though it be a remedial act, it is also very highly penal, and we ought not, by subtle reasoning, to set aside an annuity where the matters required by the act have been complied with.

ROOKE J. I am of the same opinion. The statute requires the consideration to be set forth: that is the money, if that had been withheld for any length of time, and the deed had stated it to have been paid on the day, the consideration would not have been fairly set forth. In the present case the transaction was *bonâ fide;* all parties meant honestly, the grantee of the annuity deposited the money in the hands of *Harvey*, and put it out of his own power. One party executed the deed at the time when the money is stated to have been paid, and the other a few days after. Shall the latter then take advantage of his own neglect in not executing the deed at the same time? I think that the case of *Coare* v. *Giblett* was rightly decided, and that the present case ought to be determined the same way; it appears to me that the consideration is rightly set forth.

CHAMBRE J. I cannot entertain a doubt on this question. We have only to see whether the party has conformed to the act of parliament. The name of the person advancing the consideration must be stated; now there is nothing untrue in that part of the statement that the purchasor is the person who advanced the money, and whose name is to be stated. Is it fully and truly stated, for it is upon these words only that any question can arise? It is so stated. When the money was paid to the agent, it was paid to the principal; as soon as the purchasor parted with it, it was out of his power. The moment it was paid into the hands of the agent, it was paid to the grantee, and it was the fault of the latter that he did not receive it sooner. When the deed was executed,

1806.

CRAUFURD v. PHILLIPS.

the money became absolutely his property, from the moment when it came into his agent's hands. If indeed any matter had been agreed upon, by which payment of the consideration was to be delayed to the disadvantage of the grantor, I should not have thought the consideration fully and truly stated; but in the present case I think it is.

Judgment for the Plaintiff.

Feb. 12.

NURSE *v.* CRAIG.

If husband and wife separate by deed, and the former covenant with *A.* her sister to pay to his wife, or such person as she should appoint, a certain weekly allowance during their separation, and the wife afterwards live with *A.* and is by her supplied with necessaries, and the husband fails to pay the stipulated allowance to his wife, *A.* may maintain an *indebitatus assumpsit* against the husband for such necessaries.

INDEBITATUS assumpsit for meat, drink, washing, lodging, and other necessaries, with the common counts for money lent and advanced, paid, laid out, and expended, had and received, and on an account stated.

The cause was tried before Sir *James Mansfield* C. J. at the *Guildhall* sittings in last *Trinity* term, when it appeared that the Defendant and his wife, having agreed to separate from each other in the year 1802, a deed of separation was executed in the year 1803, between the Defendant, who was a taylor in low circumstances, of the first part, his wife of the second part, and the Plaintiff, who was sister to the Defendant's wife, of the third part, by which the Defendant covenanted with the Plaintiff, and agreed with his wife that he would permit his wife to live apart from him as a single woman, and would suffer her to enjoy all the effects then in her possession, or which she might thereafter acquire, notwithstanding her coverture; and assigned the same to the Plaintiff as her trustee, and made the Plaintiff, his attorney, to sue for the same in trust for his wife. And further covenanted with the Plaintiff, that he would pay unto his wife,

wife, or to such person as she should appoint, for and towards her maintenance, an annuity of 13*l.* at the rate of 5*s.* per week, during her life, for all such time as she should live separate and apart from him, which she agreed to accept, in full satisfaction, for her support, maintenance, and alimony, provided, that if the Defendant should pay any debt which his wife, during such separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the said weekly sum of 5*s.* until he should be reimbursed; that the Defendant's wife, upon this separation taking place, went to live with the Plaintiff, her sister, and was furnished by her with the necessaries for which this action was brought, and that the Defendant having for some time failed in payment of the weekly allowance stipulated by the deed, this action was commenced to recover from him the amount of what had been furnished to his wife. In the course of the trial, the deed of separation having been produced, Sir *James Mansfield* C. J. was of opinion, that the Plaintiff, who was the trustee in that deed, could not maintain the present action, framed as it was, and accordingly nonsuited the Plaintiff.

A rule *nisi* for setting aside the above nonsuit, and having a new trial, was obtained in last *Trinity* term.

Onslow Serjt. now shewed cause against that rule. The question here is, whether an action of *assumpsit* upon an implied contract, can be maintained by the present Plaintiff, who is trustee in the deed by which a separate maintenance is secured to the Defendant's wife? The principle laid down by Lord Chief Justice *Holt*, in *Todd* v. *Stokes*, 1 *Ld. Raym.* 444. must govern this case, and indeed that principle has prevailed in *Westminster Hall* from the time of *Todd* v. *Stokes* to the present day. In that case the husband and wife had been separated for the space of five years, the husband having, by articles to

1806.

NURSE v. CRAIG.

trustees, secured to the wife an allowance; the action was against the husband by an apothecary, (not one of the trustees of the wife as here), to recover for medicines furnished to the wife; Lord Chief Justice *Holt* nonsuited the Plaintiff, saying, though the Plaintiff had not personal notice of the separation, and though it was not the general reputation in *London*, where the Plaintiff lived (the husband living at *Chichester*,) still the husband, by the separation, was discharged from his liability even for necessaries. To that case in *Ld. Raym.* there is added a note of *Lungworthy* v. *Hockmore*, where Lord Chief Justice *Holt* ruled, that if a husband turn away his wife, he is liable to tradesmen for necessaries, though not if she elopes. According to those cases, the present Defendant, had he separated from his wife, without allowing her a maintenance, would have been liable to tradesmen furnishing her with necessaries; but how can he be called upon to repay this Plaintiff, who not only had notice of the separation, but is the trustee, whose duty it is to enforce payment of that allowance to the wife, which was secured to her at the time of the separation? Whether the allowance be sufficient or not can never be made a question, where there is a deed securing that maintenance, and trustees on the part of the wife to enforce it; and so too Justice *Buller* held in a case before him. Indeed, why should the Court furnish the Plaintiff with an action of *assumpsit* on an implied contract, when she has already an action of covenant on the deed in her own power? Such a decision would be liable to this hardship and inconvenience, that the Plaintiff, after recovering the amount of her debt, might still sue the Defendant upon the covenant, and so the Defendant would be charged by his wife beyond the allowance secured at the time of separation.

Best

1806.

NURSE v. CRAIG.

Best Serjt. in support of the rule. The case of *Todd* v. *Stokes* is a mere *nisi prius* decision, and not supported by any subsequent authority. If, therefore, the Court do not agree with the principle there laid down, or find any cases establishing principles not reconcileable therewith, they will have no difficulty in over-ruling that case. Now in *Marshall* v. *Mary Rutton*, 8 *Term. Rep.* 545. principles quite inconsistent with those laid down by Lord Chief Justice *Holt* are to be found, denying all effect to contracts of separation between husband and wife, and deciding that no agreement between themselves can alter the state of liability and non-liability which the law imposes upon each. The words of Lord *Kenyon* in that case are, "how can it be in the power of any persons by their private agreement, to alter the character and condition which by law results from the state of marriage while it subsists, and from thence to infer rights of action and legal responsibilities as consequences following from such alteration of character and condition? How can any power short of the legislature change that which by the common law of the land is established as the course of judicial proceedings?" This doctrine is not consistent with the principle that the allowance of a separate maintenance to the wife exonerates the husband from that liability on implied *assumpsits*, to which the law subjects him in support of his wife. Indeed, if it were otherwise, a husband might always oblige his wife to accept an insufficient allowance, and so exempt himself from that charge which is thrown upon him by the law of *England*, viz. the charge of maintaining his wife according to his own condition and circumstances in life. Nor does the circumstance of this Plaintiff being the trustee in the deed make any difference in the case; for the covenant to the Plaintiff is to pay the allowance to the wife, and not to the Plaintiff herself, so that she has no fund out of which she can pay herself, and while she is enforcing the

1806.

NURSE v. CRAIG.

covenant at law the wife must starve, unless the law raises an implied *assumpsit* in favour of all those who supply her with necessaries.

Cur. adv. vult.

On this day, the learned Judges not being agreed, delivered their opinions *seriatim*.

CHAMBRE J. In general where a separation of husband and wife takes place by consent, the obligation to maintain the wife lies upon the husband, unless she forfeits her right to that maintenance by her own misconduct. A provision for a separate maintenance is of modern introduction. Lord *Mansfield*, in the case of *Corbett* v. *Poelnitz*, 1 *Term Rep.* 5. states the origin of this practice: he says, in the ancient law there was no idea of a separate maintenance; but when it was established, what said the Courts? that the husband shall not be liable even for necessaries; and they said so, because convenience and justice require it. And *Ashhurst* J. says, that it would be unreasonable to permit the wife to affect the property of her husband, except where he will not allow her necessaries; for which her contracts are the contracts of her husband. Now if reason, justice, or humanity ought to govern in the present case, I think it my duty to consent to the allowance of this action, since all the reasons upon which exceptions to this kind of action have been founded, totally fail in the present instance. I will state the cases. In *Todd* v. *Stoakes*, 1 *Salk.* 116. *Holt* Ch. J. says, If baron and feme separate by consent, and she has a separate allowance, it is unreasonable she should still have it in her power to charge him. The case states that the wife had a separate allowance of 20*l.* *per annum*, and it may be presumed that the allowance was regularly paid; but this fact does not rest upon presumption; for according to the report in 1 *Ld. Ray.* 444.

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it was averred in the plea that the allowance was paid according to the articles. In *Cragg* v. *Bowman*, 6 *Mod.* 147. where an action was brought for lodgings supplied to the wife of the Defendant, who had parted from him by consent with a separate maintenance, and had lived in adultery, but without the Plaintiff's knowledge, the Plaintiff was nonsuited; but it is expressly stated to have been proved, that the maintenance was duly paid to her, which confirms the idea that an actual payment of a maintenance is necessary to discharge the husband. The declaration in *Corbett* v. *Poelnitz* also states the payment of the separate maintenance. In this case the object was to shew that the wife herself was liable according to the doctrine which then prevailed, for which purpose it was necessary to shew that the husband was not liable. And in *Ringstead* v. *Lady Lanesborough*, 1 *Term Rep.* 6. the Defendant having pleaded coverture, the Plaintiff in his replication stated not only that she had a separate allowance secured by deed, but that it was duly paid. So in *Barwell* v. *Brooks*, *Cooke's Bank. Laws*, 29. the replication stated that the separate maintenance was regularly paid. And in the last instance of an action brought against the wife, *viz.* in *Marshall* v. *Mary Rutton*, where it was determined that the wife was not liable; the replication in like manner stated that the separate maintenance had been duly paid. So that in all these instances it appears to have been thought necessary to lay a foundation for the exemption of the husband, by shewing that the maintenance had been duly paid as well as secured. Thus it stands on the authorities. In point of reason I cannot see the least shadow of doubt. The case may be considered as in some measure analogous to an accord and satisfaction, where the accord avails nothing unless satisfaction be made. Of what use is the covenant for an allowance if the maintenance be not paid? It does not give a credit to the wife; for no action can be brought against

1806.

NURSE v. CRAIG.

against her. It is to supply her with ready money; for if she have a provision which is duly paid, she will have the means in her hands of acquiring all the necessaries of life suitable to her degree. If tradesmen give her credit it is their own fault; they can neither sue her nor the trustee; and if the mere covenant exempt the husband, a person who has provided clothes or meat for the wife may be compelled to seek his redress in the court of equity, and in the mean time the wife must starve. It is unreasonable in the highest degree to consider that as a ground of exemption which the law itself would impose. In the present case the inconveniencies of the doctrine contended for are illustrated in the strongest manner on account of the smallness of the provision; the allowance is five shillings *per* week. Is this woman to be taken into a court of equity and to wait the usual period for decisions of this sort? how is she to subsist in the mean time? The inconvenience indeed might be in some degree the same, though the amount of the provision were greater. No property is conveyed to the trustee; it is a mere personal contract; and if the allowance were a thousand pounds *per annum*, and the husband chose to withhold it, no tradesman could venture to trust the wife, since he could have no reliance on any thing but her honour for being reimbursed after a dilatory course of proceeding in equity. I think, therefore, that the ground on which the exemption was supposed to be founded, totally fails; and that there is neither reason nor justice to support it. I am therefore of opinion, that the nonsuit ought to be set aside. Whether this will ultimately avail the Plaintiff in this action I will not undertake to say. There may perhaps be other grounds of defence; but as the nonsuit rested on the ground that has been stated, and that merely, I think that it ought to be set aside.

ROOKE

ROOKE J. I have entertained great doubts on this subject; but my present opinion is in favour of the action. The Plaintiff, being a trustee in the deed of separation, had another remedy; she might have brought an action on the deed. At first I was at a loss how to imply the assent of the husband to the contract of the wife, so as to support the action of *assumpsit* against him; and I thought that it would be hard that the husband should be liable to two actions. But I have got over these difficulties. First, this action is brought for the immediate supply to a woman supposed to be in actual necessity; and though the Plaintiff be the trustee in the deed, and was therefore entitled to another remedy, yet as the money was to have been paid to her in the first instance, I think that she was warranted in supplying the wife with necessaries, and taking her choice of actions for her own indemnity. As to the assent of the husband, I think that the law will raise an *assumpsit* so as to make him liable; and though by these means he becomes subject to two actions, his liability has been occasioned by his own default. If he had paid the annuity regularly, this question never could have arisen, for the trustee and the husband had agreed what should be the quantum of necessaries. It appears to me that the Defendant has given sentence against himself by the articles of separation; for it is only provided that he shall be indemnified against debts which his wife may contract during the separation, and payment of the annuity; so that he does not stipulate for an indemnity except during such time as the annuity shall be duly paid. On the best consideration which I have been able to give the case, I think the nonsuit ought to be set aside.

HEATH J. The question is, Whether a separate maintenance, secured by deed to the wife, be sufficient to discharge the husband from his liability to provide necessaries for her, where that maintenance has not been duly paid?

1806.

NURSE v. CRAIG.

paid? Five or six cases have been mentioned by my Brother *Chambre*, in which a separate maintenance has been pleaded, and payment averred; and I cannot help thinking that Lord Ch. J. *Holt*, in the case of *Todd* v. *Stoakes*, laid a stress upon that circumstance; for why should he suppose that tradesmen would trust a wife upon her own credit, unless the circumstance of payment operated upon his judgment. The allowance without payment in this view of the case would be totally immaterial. In *Bacon's Abridgment*, title *Baron and Feme*, H, it is laid down that if a husband allow his wife a separate maintenance he shall not be liable during the time he pays such maintenance. These cases, therefore, in which the payment of maintenance has been set forth in the pleadings, and the passage to which I have referred in *Bacon's Abridgment*, strongly shew the sense of the profession from the time of Lord Ch. J. *Holt* to the present hour. As to principle, it is the duty of the husband to provide necessaries for his wife. The question is, Whether he discharges that duty merely by entering into a covenant with a trustee for payment of an allowance? If he refuse to perform that covenant, the wife may be starved before redress can be obtained. The common law does not relieve any man from an obligation on the mere ground of an agreement to do something else in its place, unless that agreement be performed. Accord without satisfaction is no plea. In this case the wife is no contracting party to the covenant; she only assents by her signature, and if she had not executed the deed, she would have been equally bound by accepting the maintenance. The case is not varied by the circumstance of the Plaintiff being the trustee in the deed. The agreement could have no operation in destroying the husband's liability by transferring the credit to the wife, unless accompanied by payment; she cannot be in a worse condition than if she cohabited with her husband. Now in the

1806.

NURSE v. CRAIG.

the case of cohabitation the husband would be liable for necessaries, unless he supply his wife with money to furnish herself; for his assent to her contracts must either be express or implied. In the case of *Morton* v. *Withens*, *Skin.* 348. the Defendant and his wife lived in the same house, and the wife had a separate allowance of 50*l.* *per annum* for her clothes. The action was brought for goods furnished to the wife, and *Treby* Ch. J. said that if the goods were furnished upon the credit of the husband, the Plaintiff was entitled to recover, if the goods were suitable to the quality of the wife, he not having had notice of the allowance; but if he knew of the differences between the husband and wife, and sold the goods only to ruin the husband, the latter should not be chargeable; but it having been proved that the goods were used by the wife in the presence of the husband, the jury found a verdict for the Plaintiff. This was a case where the husband and wife lived in the same house, and the latter had been supplied with money, yet the assent of the husband was implied from his having seen his wife make use of the goods. In the present case, where the husband and wife are separated, and no money has been given to supply the wife with necessaries, the consent of the husband may be much more strongly implied. In the case of *Manby* v. *Scott*, which is best reported in 1 *Siderf.* 109. it was said that a general prohibition to all persons to supply the wife with necessaries is void. But if such a covenant as this, without payment, be sufficient to exempt the husband from his liability, it would have the same effect as a general prohibition. At common law the wife may have recourse to any friend for necessaries if the husband refuse her, and the husband is bound to pay for them; for when the law imposes a duty it raises a promise on the part of the person upon whom it is imposed to discharge it. All deeds of separation suppose the husband's liability, for they all contain a covenant to indemnify him against

1806.

NURSE v. CRAIG.

against the wife's debts. To suppose that a woman who is parted from her husband under an agreement for a separate maintenance is not by law entitled to charge her husband with payment for necessaries, when he withholds the stipulated allowance, shocks my humanity and revolts my reason.

Sir JAMES MANSFIELD C. J. I differ from my three Brothers in this case; but I have this satisfaction, that if my opinion be wrong, it will be of no consequence, since the opinion of my Brothers must prevail, and justice will be done. After giving to the subject the best consideration in my power, I cannot but entertain the same opinion now which I held at the trial. In the first place I think that a general provision for the separate maintenance of the wife, whether the husband pays or not, deprives the wife of the advantage of the common law, and prevents the husband from being sued, either in *assumpsit* or debt, for necessaries furnished to the wife. And I also think in this case, that if the general law were not so, this action could not be maintained, because the person who supplied the necessaries was the very person with whom the covenant was made, and must therefore be presumed to have trusted the wife on the credit of the deed. Not that I think this makes any difference in point of law; but with respect to the remedy there is this difference, that the Plaintiff has a short remedy by action on the covenant, whereas in other cases, the person furnishing the necessaries would have no remedy, but must trust to the honour of the wife. Every man who gives credit to a married woman living apart from her husband, gives credit to her representations; unless he happens to be personally acquainted with the articles of separation. An objection has been raised to the legality of the covenants in this deed; but such covenants have been so long supported, both at law and in equity, that it is impossible now to give

give weight to the argument. The covenant contained in this deed, therefore, must be considered as valid. Here the husband and wife separate, and the husband covenants with the present Plaintiff to pay 5 shillings per week by way of maintenance to his wife, and the mode of payment is either to the wife herself, or to such person as she shall appoint. Upon failure of payment, there is no doubt that the Plaintiff may maintain an action on the covenant. This mode of covenanting to pay so much money is not uncommon; sometimes the provision is made by settling an estate with power of entry, sometimes by setting apart money in the funds, but there is no difference with respect to the husband between one mode and the other; one may be a better security than the other, but in each case the husband is to pay the money, and he parts with some portion of his property for a separate maintenance for his wife. In all these cases, the person who gives credit to the wife is without remedy; the wife herself is without remedy. If an ejectment be brought for lands, the demise must be by the trustee; money in the funds must be sold by the trustee. An action of covenant must be brought by the trustee. The only way, therefore, by which the wife can compel payment, must be by proceeding in equity, and though it may seem ridiculous to send her to a court of equity to compel payment of so small a sum as 5 shillings per week, yet the rule must be the same whether the sum be great or small. It seems to me that when agreements of this sort are entered into, the husband is bound to pay the sum for which he covenants, and no more; to that extent he must pay, though it should amount to three times as much as his wife's maintenance. The effect is to make the separate provision the separate property of the wife. She may mortgage it. If she save any thing and die, she may dispose of it by will, without consent of her husband. This has been long since determined

1806.

NURSE v. CRAIG.

mined in equity. By these means she has in a certain manner established by deed a separate fortune in herself. She lives by herself. If then persons under these circumstances trust her with such a provision in her hand, can they in general be considered as trusting her on that rule of law, that a husband, in consequence of his obligation to provide for his wife, is presumed to assent to the supply of necessaries? When he has made a distinct provision, his assent to any other mode of provision I cannot presume, much less can I find a ground in any decided case for supporting a different mode of provision than that which is contained in the deed. Where I see a covenant to pay a specific sum, I cannot find a ground in law for supporting an *assumpsit* on the presumed assent of the husband. I forbear to cite cases, because many are to be found in every equity report which shew that this is the separate fortune of the wife, that she may dispose of it as she pleases. A difficulty has occurred to me with respect to the question of payment, which I have not been able to get rid of. It is supposed, that notwithstanding the provision as a separate maintenance and fortune to the wife, yet unless the husband pays, the common law right arises. I have endeavoured to satisfy myself how long payment must be delayed before the common law right arises; sometimes payment is to be made half-yearly; where it is to be made out of estates, it is according to the reservation of the rents. These are sometimes quarterly, sometimes half-yearly. How long must it be after the end of the quarter or half year before the common law right arises; is it to be a week, a fortnight, or a day? The wife must have meat and clothes from day to day. If it arises upon non-payment, and payment should be delayed for a month, those who give credit to the wife in the mean time must trust her on the common law right, and if an action were brought for necessaries, the jury might think that three times as much

1806.

NURSE v. CRAIG.

much ought to be allowed, as the sum agreed upon. Suppose part only to be paid, to what extent is the husband liable to be charged? It may be said, that these difficulties are occasioned by the husband breaking his covenant. But there is another difficulty if the common law right arises upon non-payment. Does the covenant ever revive again, or is it entirely gone? I should think that it is entirely gone. If the husband once become subject to pay for necessaries in consequence of not paying the stipulated maintenance, when is the covenant to revive again by payment of the stipulated sum? These certainly are difficulties, but without these I should be of opinion, on the general ground, that where a provision is secured to the wife as her separate property, and she lives as a *feme sole*, the persons trust her upon her own credit. The protection given to the husband against the debts of the wife is merely a power to retain so much as he shall be obliged to pay; but this is no security, for a jury may think that five times as much ought to be recovered for necessaries as the amount of the sum stipulated. In common cases there is a covenant on the part of the trustees to indemnify the husband against all debts of the wife, so long as they shall live separate. But if the husband in such a case as this be obliged to pay debts of the wife, that covenant ought to be confined to the time during which the husband shall continue to pay the maintenance, and it ought to be expressed, that if the husband delayed payment for such a time, he should be liable to pay those who trusted his wife for necessaries. There ought also to be some proviso to guard against the doubt whether the covenant was to be entirely done away, or only suspended by non-payment. As this action is brought by the trustee, no difficulty can arise respecting any other action. But suppose some other person had supplied the necessaries and brought the action; according to the doctrine, that

1806.

NURSE v. CRAIG.

payment of maintenance is necessary to exempt the husband, the Plaintiff must have recovered for necessaries. Then if the trustee had brought an action on the covenant for non-payment of maintenance, could the first action be pleaded in bar? If not, the husband would be liable to two actions, though the object of the deed was to make him liable only to one, and to relieve him from all other obligations. Where a woman is put into a situation with respect to certain property as a *feme sole*, no credit is given to the husband, but those who supply the wife trust only to the separate fortune which they know that she has. Nor can any assent of the husband, as it appears to me, be implied, where he has executed a deed covenanting to pay a certain stipulated sum; for I cannot imagine that he could mean to make himself liable to any other payment. In this particular case however it seems quite impossible to say that the husband has assented to raise any implied *assumpsit* to pay the Plaintiff upon any other contract, but that which is contained in the deed by which he covenants to pay her a certain stipulated sum. Suppose the husband had known that his wife lived with the Plaintiff, could it have entered into his mind that he was to pay more than the sum mentioned in the deed? This would be not only to imply an *assumpsit* without ground, but directly contrary to the fact: it would be implying an engagement of one sort, when there is another engagement totally contradictory to and inconsistent with it. It has been supposed that it would be hard upon the wife if this action could not be supported; that hardship I do not feel. In the first place, the Plaintiff trusted the wife when she had a remedy in her own hands, and she could have no difficulty in trusting the wife to the extent of the money which she was entitled to recover. But it may be observed in general, that whoever trusts a married woman trusts to her honour only. If the wife says that

1806.

NURSE v. CRAIG.

that the money has not been paid, you must depend upon her word for the truth of the assertion; you must depend upon her honour for making use of the remedies against her trustees to compel the payment. And if the money be paid to the wife, the creditor must trust to her honour for paying it over to him; for I know of no remedy by which she may be compelled to do so. A court of equity has never gone the length of charging the separate estate of a married woman, except on the ground of agreement. Where the wife has agreed to sell, the Court will compel the sale. *Grigby* v. *Cox*, 1 *Ves.* 517. Or if she enter into a joint bond with her husband, the Court will charge the rents and profits of her estate with payment. *Hulme* v. *Tenant*, 1 *Brown* 16. All these depend on agreement; but I know of no case where, on the mere ground of things being supplied to the wife, a court of equity has compelled her to pay those who have trusted her; and it is quite clear there is no remedy at law. It is not only in this case therefore where payment of maintenance has been withheld, that credit must be given to the equitable rights of the wife, and to her honour for enforcing them, and applying the money in payment of her debts. I admit, that the practice of averring the payment of the separate maintenance in pleading, shews the apprehension either that the payment was necessary, or at least that it made the case stronger. But the language of the cases themselves impress on me a different idea of the opinions of the Judges who decided them. In *Todd* v. *Stokes*, though payment had been made, nothing is said upon the subject. The language of Lord *Holt* is, "if baron and feme separate by consent, and she has a separate allowance, it is unreasonable she should have it still in her power to charge him." Now what is a separate allowance but an agreement for an allowance? He goes on, "and it is not to be presumed but tradesmen that

1806.

NURSE v. CRAIG.

deal with her trust her on her own credit, and not on the credit of her husband." Did Lord *Holt* suppose, that if the husband omitted to pay the allowance for a month, that he might be charged? If so, the tradesman would not trust the wife on her own credit, but on the credit of the general law. Neither in *Salkeld* or Lord *Raymond* is any reliance whatever placed on the circumstance of payment. According to the report of the same case in 12 *Mod.* 244. the second resolution was this, "that if husband and wife part by consent, and the husband secure her an allowance, it is in consideration that he should not be charged any more by her; and it is unreasonable he should be charged for victuals or physic, or other necessaries after." What is the meaning of this? as soon as the deed is executed the allowance is secured, and I know of no difference between a security by covenant, by conveyance of lands, or by transfer of funds. Is it not clear then that the person who stated that resolution supposed that securing the allowance put an end to the common law obligation? If payment had been considered as necessary, it is natural that it should have been added. The terms of the resolution require that it should only be secured. The case of *Angier* v. *Angier*, which is to be found 2 *Eq. Ca. Abr.* 150. *Gilbert's Eq. Rep.* 152. and *Prec. in Chan.* 499. strongly implies that a neglect to pay a separate maintenance would never raise a common law obligation against the husband. A bill was brought by the wife's *prochein amy* against her husband for a special execution of articles, whereby the husband was to allow her 52*l. per annum* separate maintenance, and he had a decree for the arrears and growing payment in 52*l. per annum*; and the Lord Chancellor said, "where a husband makes a separate provision for his wife, he is not chargeable by law for her debts;" but though that were so, yet to avoid the expence he might be

1806.

NURSE v. CRAIG.

be put to in defending such suits, his Lordship sent it to a master to settle a security to indemnify the husband against the wife's debts. Here the separate maintenance had been withdrawn for some time; yet the Lord Chancellor says, where a husband makes a separate provision for his wife, he is not chargeable by law for her debts. In the common sense of the word, when a man executes any such securities as I have before mentioned, he makes a provision for her. It may be observed that the Chancellor decreed all the arrears and growing payments to be made, but if the law were as now contended for, some enquiry ought to have been made, whether any debts had been contracted by the wife for which the husband was liable, and a deduction should have been made of the amount: no such deduction, however, was made. These cases, therefore, when fairly expounded, seem to shew the payment has never been considered as an essential circumstance. According to my own recollection of what has fallen from Lord *Mansfield* upon this subject, I have the strongest impression of having heard him over and over again declare, that where a separate maintenance was agreed upon, it put the parties in a new situation, and that the husband was relieved from any common law obligation, being subject to no other than that which was contained in the deed of separation. But my Brother *Chambre*'s recollection is different from mine on this subject, and I defer to his memory as better than my own. There is one circumstance, however, which weighs very strongly with me in this case, that no instance is to be found in which such an action has ever been maintained against a husband who had agreed to make a separate maintenance; and yet there must be many cases in which payment must have been delayed beyond the stipulated time. I cannot say how long these deeds may have been in use, but they certainly are of earlier date than any of the

1806.

NURSE v. CRAIG.

the cases in our law books, which have been referred to. In 1 *Eq. Ca. Abr.* a case is referred to in *Tothell*'s Transactions in the High Court of *Chancery*, page 97, to shew, that a woman who has a separate maintenance may dispose of what she saves out of it by will. That was about the year 1720. The date of the case in *Salkeld* is the 8 *W. 3.* And in modern times these deeds have been very frequent, yet no instance is suggested of an action like this having been maintained. These contracts for separate maintenance would be of very little use if the husband's exemption depended on payment, for if a husband puts his wife into a lodging, and pays her a reasonable sum for maintenance, that will be an answer to an action at common law. It seems to me, therefore, in general, that where a man has entered into a contract, and secured a separate maintenance to his wife, the common law obligation is at an end, and the persons who trust the wife, trust her on her own credit. But if that be not so under the general law, still I think that where a person trusts her, having a deed in his own hands, empowering him to compel payment of a stipulated sum, the Court cannot raise an *assumpsit* by implication in his favour against the husband. I differ from my Brothers, but the judgment of the Court is that the rule be made absolute.

Rule absolute.

WILLIS *v.* PENDRILL.

Feb. 3.

A *capias* directed to the sheriff of *Middlesex* cannot be served in *London*.

THIS was a rule to shew cause why the declaration should not be taken off the file. The only question was, whether a *capias* directed to the sheriff of *Middlesex* could be served in *London*, in a case where the process was not bailable?

Best Serjt. contended, that where the process was not bailable, the only object was to give personal notice to the party. He cited *Kelly* v. *Shaw*, 6 *Term Rep.* 74. where the Court of *King's Bench* held the service of a *latitat* in the county of *Middlesex* sufficient, and *Busbey* v. *Fearon*, 8 *Term Rep.* 235. where the same Court held a writ directed to the sheriff of *Northumberland*, to be well served in *Newcastle upon Tyne*, though out of that county. He insisted that there could be no difference between a *capias* and a *latitat*, since there were different files for the different counties in the *King's Bench*, though the officer was the same for all; and observed, that if this service were deemed insufficient, great inconvenience might arise where defendants lived upon the boundaries of two counties; he added, that in this case the same person was filazer both for *Middlesex* and *London*.

Bayley Serjt. *contrà*, urged that in the *King's Bench* all *latitats* were issued by one officer, but that in the *Common Pleas* there were distinct officers for each county, and that the circumstance of the same person being filazer both for *London* and *Middlesex* in this case, was mere matter of accident, and could not vary the rule; that if

1806.

WILLIS v. PENDRILL.

it were allowable for a person to take out a writ with a filazer of one county and serve it in another, all the business might be thrown into the hands of one officer. He cited *Borman* v. *Bellamy*, 1 *Term Rep.* 187. where the Court of *King's Bench* held that service of a bill of *Middlesex* in *London*, was irregular, and distinguished it from the case of a *latitat*.

The Court said, that as writs of *capias* were issued by different officers for different counties, the service in this case must be deemed irregular, for if they should hold otherwise, it would go the length of authorising persons to take out all writs of *capias* from one officer.

Rule absolute.

1806.

Feb. 10.

ANTHILL qui tam *v.* METCALF.

A summons for time to enter the issue when returnable is a stay of proceedings.

THE Plaintiff in this case having taken out three successive summonses for time to enter the issue, the Defendant, on the day upon which the last summons was returnable, signed judgment of *non pros.* A rule having been obtained to set aside this judgment for irregularity,

Onslow Serjt. shewed cause, and contended that the summonses were no stay of proceedings, and therefore, as the time for entering the issue had elapsed, and no order had been made, the Defendant was entitled to sign judgment.

Shepherd Serjt. *contrà*, insisted that although a summons was no stay of proceedings till returnable, yet that when returnable it was, and that if the Defendant wished the proceedings not to be stayed, he ought to have appeared upon the first summons, or have consented to the order.

The Court thought that the summons for time to enter the issue was a stay of proceedings when returnable, and made the

Rule absolute.

1806.

Feb. 10.

GOGGERLY *v.* CUTHBERT.

If *A.* indorse a bill, drawn in his favour and accepted, to *B.* in order that he may raise money for *A.* by negociating it, and *B.* gives it to *C.* who puts it into the hands of *D.* without consideration, two years after the bill is due, *A.* may recover back the bill from *D.* in trover.

TROVER for a bill of exchange.

This cause was tried before Sir *James Mansfield* C. J. at the sittings after *Michaelmas* term, when it appeared that the bill in question was drawn by one *Parnell*, in favour of the Plaintiff, who, having got it accepted, indorsed it himself, and put it into the hands of a person of the name of *Daponte*, for the purpose of getting it negociated, and raising money upon it for the benefit of the Plaintiff; that *Daponte*, instead of getting the bill discounted, gave it to his brother, from whom it came into the hands of the Defendant, without consideration, two years after it became due. A verdict was found for the Plaintiff, with liberty to the Defendant to move that a nonsuit might be entered.

A rule for this purpose having accordingly been obtained,

Shepherd Serjt. was now to have shewn cause;

But *Best* Serjt. being called upon to state his objections, contended, first, that the Plaintiff, by indorsing the bill, had parted with the legal property in it, and could not therefore maintain an action of trover. Secondly, that the bill itself was of no value, and that the Plaintiff could not be sued upon it.

Sir JAMES MANSFIELD C. J. The indorsement of the bill was merely for the purpose of enabling *Daponte* to receive the money. If *Daponte*, after receiving the bill, had betrayed an intention of obtaining the money and running away with it, could not the Plaintiff have demanded the bill again of him? and if he could, why can

can he not demand it of any person into whose hands it comes dishonestly? As to the bill being worth nothing, it is of importance to the Plaintiff to get it back again.

HEATH J. The delivery of the bill was not absolute, but conditional, and was in the nature of the delivery of an escrow.

CHAMBRE J. The Plaintiff only parted with a possession of the bill, and enabled another person to make the legal disposition of it. The defendant having taken it after it was due, received it with all its infirmities.

Rule discharged.

THE Reporters by accident omitted to notice in the 1st Volume of the New Reports, that in *Easter* Term 1804 Mr. Serjt. *Williams* was promoted to the rank of King's Serjeant.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED,

IN THE

1806.

Court of COMMON PLEAS,

IN

Easter Term,

In the Forty-sixth Year of the Reign of GEORGE III.

HALLEWELL, Clerk, *v.* TRAPPES. *April* 24th.

In debt for subtraction of tithes of any particular article, the Plaintiff, though he allege the tithe of that article to have been "granted, yielded, and paid, and of right due and payable," on the land in question 40 years next before the making of the stat. of *Ed.* 6. need not prove that the particular article was cultivated there at that time, but it lies on the Defendant to prove that it was not.

THIS was an action of debt for subtraction of tithes. The 1st count of the declaration alleged that "*the tithes of turnips* yearly growing or renewing arising or happening of in and from the said eight acres of land within 40 years next before the making of a certain act of parliament made in the parliament of the lord *Edward* the Sixth late king of *England* held, &c. *were granted yielded and paid and were of right due and payable* in their kinds as they grew and arose by the occupiers of the said eight acres of land." The 2d count was the same as to the tithe of potatoes, and the third as to the tithe of corn. The cause was tried before *Rooke* J. at the last

1806.

HALLIWELL v. TRAPPES.

assizes for the county of *York*, and a general verdict found for the Plaintiff, with 50s. damages.

Shepherd Serjt. now moved for a rule to shew cause why the verdict should not be set aside and a new trial be had, objecting that the allegation in the first and 2d counts, with respect to turnips and potatoes, was not proved, and could not be proved, inasmuch as the cultivation of both these articles was introduced into this kingdom subsequent to the statute of *Ed.* 6. He urged that the Plaintiff, by the form of his allegation, had bound himself to prove, not merely that *tithe* was paid or payable for these lands 40 years before the passing of the statute, but that the tithe of turnips and potatoes was paid or payable; whereas all writers upon the subject considered both turnips and potatoes as having been first cultivated in this kingdom at a period subsequent to that at which the Plaintiff alledged tithe to have been paid for them. He insisted, therefore, that in the absence of evidence to support the two first counts, the presumption of law was against the Plaintiff, and that he could not retain his verdict on these counts.

But *The Court* said, that the true construction of the statute of *Ed.* 6. was that if the lands charged were subject to the payment of tithe within the period pointed out in the statute, that was sufficient to prove the allegation in declarations of this kind and to support the Plaintiff's action; that if it were clear that nothing but wheat had ever been sown upon this land, still that would not preclude the tithe of other titheable produce being taken, and that as no evidence had been offered at the trial to prove that turnips and potatoes were not cultivated previous to the stat. of *Ed.* 6. they could make no such presumption against the justice of the case, even though such a fact might be asserted by persons who had written upon the subject.

1806.

HALLEWELL v. TRAPPES

subject. They added, that whatever might be the case with respect to potatoes, their own information led them to believe that turnips were in cultivation in this country before the stat. of *Ed.* 6.

Rule refused (*a*).

(*a*) Vide *Mitchell* v. *Walker*, 5 *T. R.* 260.

May 7th.

The Wardens of ST. SAVIOUR'S, Southwark, *v.* SAMUEL BOSTOCK and Others, Executors of TOOTHACRE.

DEBT on Bond.

The Defendants craved oyer of the bond and condition, from which the bond appeared to be joint and several by *Jarvis Armstrong*, *John Barber*, and *William Toothacre*, for the sum of 600*l.* on the following condition: "Whereas the above bounden *Jarvis Armstrong* was on the —— last appointed collector of the church-rate of the parish of *St. Saviour*, *Southwark*, aforesaid, by virtue of which office he is empowered to collect and receive all such monies as are rated and assessed on the inhabitants by virtue of the said rate, and for which he is accountable to the wardens of the grand account of the said parish, if the said *Jarvis Armstrong* do and shall from time to time, when and so often as thereunto required, render a just and true account of all monies so by him received, or hereafter to be by him collected or received, on account of the above rate, as also all

A., *B.*, and *C.* entered into a bond as sureties for *D.* and *E.* The condition of which bond recited that "*D.* was on such a day appointed collector of the church-rate of the parish of *St. S.*, *S.*, by virtue of which office he was empowered to collect and receive all such monies as were rated and assessed on the inhabitants by virtue of the said rate, and for which he was accountable to the wardens of the grand account, and bound the sureties for *D.*'s duly accounting for all monies collected or received by him on account of the above rate, as also on all and every other rate or rates thereafter to be made and collected by him the said *D.*" Held that the sureties were only answerable for *D.* in that single appointment, and not on his appointment in the ensuing year.

1806.

The Wardens of St. Saviour's, Southwark, v. Bostock and Others.

every other rate or rates hereafter to be made and collected by him the said *Jarvis Armstrong*, and also do and shall from time to time when thereunto requested, surrender and deliver unto the wardens of the grand account for the time being or hereafter to be, all such sum and sums of money so by him collected and received, or hereafter to be collected and received, or any other rate or rates, as also all books, papers, and accounts which now or hereafter shall be in his custody or power concerning the said collection as aforesaid; and also do and shall in all things well, truly, faithfully, justly, and diligently serve and execute the said office, and give due attendance at all usual times therein; then the said obligation to be void," &c. They then pleaded, amongst other pleas, that the said *Jarvis Armstrong* did from time to time after the making of the said writing obligatory, when and as often as he was thereunto required, render a just and true account of all monies by him received or collected on account of the said rate in the said condition mentioned, or on account of any other rate or rates thereafter made and collected by the said *Jarvis whilst he continued in the said office in the said condition mentioned, by virtue of his said appointment*: and also did from time to time, when thereunto required, surrender and deliver unto the wardens of the grand account for the time being all such sum and sums of money by him collected and received, and also all books, papers, and accounts which at the time of making of the said writing obligatory, or at any time afterwards, were in his custody or power, touching the said collection, and did in all things well, truly, faithfully, justly, and diligently serve and execute the said office, and give due attendance at all usual times.

To this plea the Plaintiffs replied, that on the 13th day of *October* in the year 1796, to wit, at *London* aforesaid, in the parish of *St. Mary the Bow*, in the ward of *Cheap*,

1806.

The Wardens of St. Saviour's, Southwark, v. Bostock and Others.

Cheap, the said *Jarvis Armstrong* in the said condition of the said writing obligatory mentioned, was appointed collector of the church-rate of the said parish of *St. Saviour* in the said condition of the said writing obligatory mentioned, for one whole year then next ensuing, and at the expiration of that year was again appointed collector of the church-rate of the said parish, and so on from year to year at the expiration of each preceding year, and by and under and by virtue of divers successive annual appointments continued and remained collector of the church-rate of the said parish until and upon the 28th day of *February* in the year 1803, when the said *Jarvis Armstrong* died, to wit, at *London* aforesaid, in the parish and ward aforesaid: and the said wardens further say, that after the making the said writing obligatory, to wit, on the 14th day of *October* in the year 1796 aforesaid, and on divers other days and times between that day and the said period of his death, and whilst the said *Jarvis Armstrong* was and continued collector of the church-rate of the said parish of *St. Saviour* in the said condition mentioned, under and by virtue of the said appointment in the said condition mentioned, and of such several successive annual appointments as aforesaid, to wit, at, &c. he the said *Jarvis*, by virtue of the said office of collector of the church-rate of the said parish of *St. Saviour*, collected and received divers large sums of money which were rated and assessed on the inhabitants of the said parish by virtue of the said rate in the said condition mentioned, and of divers other rates made and assessed on the inhabitants of the said parish during that period, amounting in the whole to a large sum of money, to wit, the sum of 600*l.* of lawful money of *Great Britain*, and for which he was accountable to the wardens of the grand account of the said parish of *St. Saviour*; but they further say, that the said *Jarvis*

1806.

The Wardens of St. Saviour's, Southwark, v. Bostock and Others.

Armstrong did not from time, or any time whilst he so was and continued collector as aforesaid, when and so often as thereto required (as he often was) render a just and true account of all monies so by him collected and received on account of the said rate in the said condition mentioned, and on divers other rates which were thereafter made and assessed during the period he so was and continued to be collector as aforesaid, and which were received and collected by him as such collector as aforesaid; and did not from time to time during the period aforesaid, although thereunto often duly required and requested, surrender up to the warden of the grand account for the time being, or any warden of the grand account during the period aforesaid, all the said sum or sums of money so by him collected and received as aforesaid; but wholly neglected and omitted so to do: And the said wardens in fact say, that there was, at the time of the death of the said *Jarvis Armstrong*, a large sum of money, to wit, the sum of 386*l.* 18*s.* 4*d.*, of the monies received and collected by him the said *Jarvis Armstrong* as such collector as aforesaid, of and from such rate and rates as aforesaid, wholly unaccounted for, unsurrendered, and undelivered to the warden of the grand account for the time being, and which had not been accounted for or surrendered up to any other warden or wardens of the grand account for the time; but then was, and ever since has been and still is, wholly unaccounted for, unsurrendered, and undelivered, contrary to the form and effect of the said condition of the said writing obligatory, and in breach and violation thereof; nor have the said wardens, or any of their predecessors, been in any respect indemnified or saved harmless against the deficiency aforesaid, or any part of it.

To this replication there was a general demurrer, and joinder thereto.

Bayley

1806.

The Wardens of St. Saviour's, Southwark, v. Bostock and Others.

Bayley Serjt. was to have argued in support of the demurrer, but the Court called upon the plaintiffs' Counsel to begin.

Shepherd Serjt. for the Plaintiffs. The fair and reasonable construction to be put on this bond is, that it extends to any future appointment of *Jarvis Armstrong* to the office of collector, as well as to the appointment referred to in terms. Indeed it is evident upon the face of the bond that the parties all intended the bond to continue in force during the continuance of *Armstrong* in the office of collector. Although the office of collector is well known to be an anual office, yet the bond points at something beyond the year. This case is distinguishable from the case of *Liverpool Waterworks Company* v. *Atkinson*, 6 *East*, 507.; for there the collector was stated in the bond to have been appointed for 12 months, beyond which time, when so expressed, it would have been most singular to have extended the obligation. Here no time is mentioned during which *Armstrong* is to continue collector, and the question is, Whether the bond was not manifestly intended to extend to future years? It speaks of rates hereafter to be made, and of accounting with "the wardens of the grand account for the time being, or hereafter to be" Now it so happens that no provision is introduced into the act (*a*) for the election of any new great warden in the place of any one who should die, except at the end of the year.

Sir JAMES MANSFIELD Ch. J. I cannot distinguish this case from those in which it has been decided that a surety is not to be charged beyond the express words of the bond into which he has entered. It is admitted by the replication that the office of collector in the parish of *St. Saviour's, Southwark*, is an annual office, and that *Arm-*

(*a*) The local act under which the rates of the parish were managed.

1806.

The Wardens of St. Saviour's, Southwark, v. Bostock and Others.

strong was continued in that office from year to year. How then can it be intended that these persons became sureties for the good behaviour of *Armstrong* as collector at the distance of 20 years from the time when he was first appointed? Can we say that they intended to be bound for an indefinite period? With respect to the words, "the wardens of the grand account for the time being or hereafter to be," used in the condition of the bond, it must be remembered that if the collector proceeded to collect after the death of those with whom he was to account, he would undoubtedly be bound to account with the wardens of the succeeding year for the monies collected by him in that year in which he was collector. I therefore see nothing to distinguish this case from the case of the *Liverpool Waterworks Company* v. *Atkinson*, and other similar decisions on this subject.

Heath J. I am of the same opinion. The only words that could raise a doubt in this case, viz. those words which point at an account with wardens of the succeeding year, have been satisfactorily answered by my Lord Chief Justice.

Chambre J. I am of the same opinion.

Judgment for the Defendants

Joseph *v.* Orme.

May 9th.

If the acceptor of a bill of exchange not due become bankrupt, and the indorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, he may prove the amount under the commission, and if the acceptor afterwards obtain his certificate he will be discharged from the debt, and the Court will enter an *exoneretur* on the bail-piece in an action against him at the suit of the indorser.

THE Plaintiff in this case being the holder of a bill of exchange accepted by the Defendant, indorsed it for a valuable consideration to one *Adams*. Before the

bill

bill was due the Defendant became bankrupt, and a commission was taken out against him; and the bill not being paid *Adams* called upon the Plaintiff as indorser, who paid the amount, and brought this action against the Defendant as the acceptor. The Defendant having afterwards gotten his certificate; a rule was obtained calling on the Plaintiff to shew cause why an *exoneretur* should not be entered on the bail-piece.

Best Serjt. shewed cause, and contended that the bill was not proveable under the commission, and therefore not barred by the certificate. That at the time when the commission issued the bill was out of the Plaintiff's hands, and consequently there was no debt which the Plaintiff could swear was due to him at the date and suing forth of the commission. That *Adams* could not prove the debt since he had been paid, and that the Plaintiff's right did not accrue until he had paid *Adams*; which was after the commission. He cited *Howis* v. *Wiggins*, 4 *T. R.* 714. as in point; he added, that the Defendant in this particular case had admitted the debt, by agreeing to execute a warrant of attorney; which, however, he afterwards refused to execute.

Bayley Serjt. *contrà*, contended that when the Plaintiff paid the amount of the bill to *Adams* he was remitted to his old right. He observed, that the authority of the case of *Howis* v. *Wiggins* had been much shaken by that of *Cowley* v. *Dunlops*, 7 *T. R.* 565., and that Lord *Loughborough* in the case, *Ex parte Seddon*, cited 7 *T. R.* 570. had held an opinion directly contrary to the decision in *Howis* v. *Wiggins*. The Court took time to consider the case, and on this day,

Sir

1806.

JOSEPH v. ORME.

Sir JAMES MANSFIELD Ch. J. said, that they thought the Plaintiff was entitled to prove the bill under the commission; and that therefore the rule must be made absolute.

Rule absolute.

May 19th.

FLETCHER and Others *v.* BRADDICK and Others.

If a ship be chartered to the Commissioners of the Navy as an armed vessel, and an injury be done to another vessel by the misconduct of the persons on board the former, while a Commander of the Navy and a King's Pilot are on board, an action for the injury may be sustained against the owners of the chartered ship.

THIS was an action brought by the Plaintiffs as owners of a ship called *The Countess of Cardigan* against the Defendants; as owners of the ship *Samuel Braddick*, for an injury done to the Plaintiffs' ship on the 4th *November* 1804, by the Defendants' ship running foul of her as she lay in the harbour of *Sheerness*. At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* Sittings after *Easter* term, it having been proved that the injury was occasioned by the misconduct of the persons on board the Defendants' ship, in having too much cable out, the only remaining question was, whether the ship being at the time of the accident under charter to the Commissioners of the Navy, who had put on board a Commander in the Navy, who had then the command of her, the Defendants were the proper persons against whom the action should be brought? A verdict was found for the Plaintiffs, damages 31*l.* 14*s.*, subject to the opinion of the Court upon that point.

By a charter-party, dated 17th *May* 1804, between the Defendants and the Commissioners of the Navy, the Defendants let the ship to hire to the Commissioners to serve his Majesty as an armed vessel for home-service for six months certain, and so long time after as should be required. The following are the material stipulations of

the

the charter-party, viz. on the part of the owners of the ship, the Defendants:

That they should provide thirty-six men and two boys for the said vessel, being in the proportion of fifteen men and one boy to every one hundred tons, including the master and two mates, and also a surgeon, if one could be procured; two-thirds of the men to be able seamen, and the other third ordinary seamen or landsmen, to be paid and victualled at their charge. That they should cause the said ship to be forthwith docked, and all suitable repairs to be done to her to make her fit for the service she was hired for, and also supply her with certain stores in the said charter-party mentioned; carriage guns, carronades, powder, shot, and small-arms, to be found by his majesty. That the said master should strictly observe and execute all such orders and instructions as he should from time to time receive from the officer who should be appointed to command the said vessel, and that he and they would be liable to such mulct as the said commissioners should think proper to inflict for any neglect or breach of orders in the master or men.

On the part of the Commissioners: To pay freight at 15*s. per* ton *per* month, and 5*l.* 10*s. per* month for each man of her complement. That in case the said ship should be sunk, taken, or burnt by the enemy, whilst she should be in his majesty's service, provided it should appear that the loss of her did not proceed from any default of the master or her company, the said owners should have and receive from his majesty the sum or the value of the said vessel according to an appraisement made thereof before her going to sea, by such person or persons as should be appointed thereto by the said principal officers and commissioners (reasonable wear and tear being first deducted), and should also receive the full amount of the freight that should be due at the time of her being so sunk, taken, or burnt by the enemy; that the said

1806.

FLETCHER and Others, v. BRADDICK and Others.

owners should also be allowed such damages as the ship might sustain in action with the enemy, upon the particulars being certified by the king's officer who might command her, according to the valuation of the officers of any of his majesty's yards of such particular damage. It was further agreed on the part of the owners, the Defendants, to keep the said vessel so fitted and provided for the service she was employed on that his majesty's service should not at any time suffer through the want of any thing on their part, and to cause her to be cleansed when it should be required; and that if it should, they would be answerable for the same out of the wages and freight of the said ship in such sum as the said commissioners should think proper. It was also agreed, that if the refitting or repairing of the said vessel, at any time during her continuance in the service, should exceed 14 days, her freight should cease until she was again ready and reported fit for sea.

At the time the injury happened the ship continued in the king's service under the charter-party, having on board an officer of the rank of Commander in the Navy, who had been put on board by the Crown; there was also on board a King's pilot, who at the time acted as such, and gave orders to the seamen accordingly. The master and crew were appointed and paid by the owners.

The question for the opinion of the Court was, Whether the action was properly brought against the owners the present Defendants? If the Court should be of opinion that it was, the verdict to stand; if not, a nonsuit to be entered.

Best Serjt. *for the Plaintiffs.* The Defendants being the owners of the ship by which the mischief was done, they are liable, though that mischief was effected in the execution of the orders given by the captain put on board

1806.

FLETCHER and Others, v. BRADDICK and Others.

by Government. The principle upon which they are liable is, that the captain by whom these orders were given was placed in the situation which empowered him to give these orders by the contract of the Defendants. By enabling Government to put their own captain on board, the Defendants cannot exonerate themselves from any mischief done by their ship under the orders of that captain. If it be said that nothing is stated on the case to shew that the Defendants had the control of the ship, it may be answered, that it is incumbent on the owners to prove that they had not the control; they being *primâ facie* liable. It is incumbent on them to point out some other person who is liable, if they are not so. The injury having been occasioned by there being too much cable on board, the charge does not fall on any person individually, but on the owners of the ship on board of which there appears to have been an improper execution of a proper order, owing to which the injury ensued. The soundest policy is to hold the owners liable in all cases in which their liability is not clearly removed.

Lens Serjt. *contrà*. It seems to be assumed in the argument of this case, that the owners of ships stand in a different situation from other persons who are owners of any other sort of personal property; and that they are liable not only for the acts of their own servants, but for the acts of the servants of those to whom they have for temporary purposes surrendered the control of the property. It is urged that the master must not be looked to as liable, because he may not happen to be a responsible person; but the wealth or poverty of the individual or individuals liable by law can make no difference. By the terms of the charter-party the complete control of the ship is put into the hands of Government; the owners are liable to Government for any misconduct of the master or men, both of whom are stipulated to be under the

1806.

FLETCHER and Others v. BRADDICK and others.

the control of Government. For whom is the ship navigated? For Government, certainly. Unless, therefore, the temporary possession and control of a ship can be distinguished from the temporary possession of any other property, as of a house leased for a certain time, how can Government, who were in possession of this ship, be protected from liability if any mischief happens during such their possession? The owners here parted with the possession of their property, and have created a special property in other persons. There was no evidence to shew that those who had hired this ship from the owners had any exemption from those duties which belong to persons under such circumstances.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Sir JAMES MANSFIELD Ch. J. The question in this case is, Whether the owners of the ship be liable to make good the injury which has happened to the Plaintiffs? Notwithstanding the charter-party entered into between the Defendants and the Commissioners of the Navy, the ship belonged to the Defendants. It was navigated by a master and sailors provided by them, and it is difficult to say that it is not to be considered as their ship with regard to all the world except the Commissioners of the Navy. No person can be supposed to know of any private agreement between the owners and the commissioners. As far as appearances went the Defendants continued the owners at the time of the loss, for they paid the master and sailors which they had put on board. The only ground on which it can be contended that the Defendants are not liable is, that although a master and crew in the pay of the owners were in the possession of the ship, yet there was a superior officer on board, whose orders the master was bound to obey. This brings the case to this point, whether the owners, by taking a man on board belong-

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1806.

FLETCHER and Others v. BRADDICK and Others.

ing to those to whom they have let their ship, can thereby exonerate themselves from their responsibility? It appears to me that they cannot. The officer is taken on board by an agreement which the owners make. It is doubtful whether by obeying the orders of the officer it was meant that the officer should see to the navigation and direct the motion of the ship, or only direct to what place the ship should be carried, for the purpose of being employed against the enemy. The true justice of the case is, that if an injury happens through the misconduct of the master and crew the owners should be liable, but if by the misconduct of the officer, that the officer should be liable. But how is a third person to ascertain the fact? There is a provision in the charter-party, that if the injury does not happen by the fault of the master or crew, that the Crown shall make satisfaction; and this is very reasonable between the Crown and the owners. Referring the adjustment of the damage to the true cause, they can inquire into the matter between themselves; but it is impossible for any third person, who receives damage, to inquire whether it arose from the act of the master and crew or of the officer. On the whole, it appears to the Court that this ship, notwithstanding it had an officer on board, is, with regard to third persons, to be considered as the ship of the owners; and that they are therefore answerable for damage done by their ship. The consequence is that the Plaintiffs are entitled to retain their verdict.

Postea to the Plaintiffs.

May 19th.

JOHN HOPGOOD v. WM. WRIGHT, SAMUEL COOPER, RICHARD MORRIS, THOMAS KEMSHALL and ANN his Wife.

Trespass against *B. C* and *D.* for turning *A.* out of his house, and keeping the house and goods from him, plea, that *A.* had nothing in the said house and goods but "jointly and undividedly with *D.*" Judgment signed for want of a plea, and held right.

THIS was an action of trespass for turning the Plaintiff out of his house and seizing his goods, and keeping the house and goods from him.

The Defendants *Wm. Wright*, *Samuel Cooper*, *Thomas Kemshall* and *Anne* his wife, pleaded "that the said *John Hopgood*, at the time of the suing forth the said writ, had not, nor at any time since, had had any thing in the said dwelling house, shops, and premises in the said declaration mentioned, or any of them, or any part thereof, nor in the said goods and chattels in the said declaration mentioned, or in any of them, or in any part thereof, but jointly and undividedly with one *Thomas Kemshall*, who was then living, to wit, at, &c. and this," &c. &c. The Plaintiff having signed judgment, notwithstanding the above plea, treating it as a nullity, the Defendants obtained a rule calling on the Plaintiff to shew cause why the judgment should not be set aside for irregularity with costs, and why the Defendants should not have leave to amend their plea on payment of costs.

Bayley Serjt. now shewed cause, and cited the cases of *Murray* v. *Hubbart*, 1 *Bos. & Pull.* 645. and *Gray* v *Sidneff*, 3 *Bos. & Pull.* 395.

Best Serjt. being then called upon by the Court in support of his rule, argued thus: Every bad plea cannot be treated as a nullity, nor will the Court sanction such a practice. In *Murray* v. *Hubbart* the Defendant attempted to plead a variance between the writ and the declara-

1806.

HOPGOOD v. WRIGHT and Others.

declaration in abatement; and in *Gray* v. *Sidneff* the plea was held to be a nullity, because no addition is requisite in the declaration; and it cannot be shewn by oyer that there is none in the writ, because the Court will not grant oyer for such a purpose. Those cases, therefore, do not justify the Plaintiff's conduct in this instance, but proceed on another ground. Judgment cannot be signed for want of a plea, unless the plea be not merely such as may be demurred to, but such as is not applicable to the species of action. If every defective plea might be treated as a nullity, there would be an end of demurrers.

Sir JAMES MANSFIELD Ch. J. I have no doubt that this plea is such as may very properly be treated as a nullity. It is mere nonsense, and used as an instrument of delay, and therefore fit to be discouraged by the Court. What were the relations of the several parties to this suit at the time when the action was commenced, matters not at all. The plea therefore is clearly nonsense, and as such I think judgment has been properly signed. In *Thellusson* v. *Smith*, 5 *Term Rep.* 152. the Court said, "where indeed a plea has appeared on the face of it to be a dilatory plea, the Court has in some cases gone the length of saying that the Plaintiff might treat it as a nullity." Does not that rule apply to the present plea? However, as there appear to be merits in the case, there will be no harm in letting the Defendant in to plead on payment of costs.

Accordingly, upon those terms, the rule for setting aside the Judgment was made absolute.

END OF EASTER TERM.

CASES

1806.

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER - CHAMBER,

IN

Trinity Term,

In the Forty-sixth Year of the Reign of GEORGE III.

June 6th.

WILLETT v. PRINGLE.

If an action be commenced against a bankrupt after the commission, for work done before the bankruptcy, and the bankrupt afterwards obtain his certificate, the Defendant is discharged from the costs as well as the debt, and the Court will enter an exoneretur on the bail-piece.

THIS was a rule to shew cause why an *exoneretur* should not be entered upon the bail-piece, the Defendant, who was a bankrupt, having obtained his certificate.

The action was brought upon an attorney's bill for business done previous to the bankruptcy, but the action was not brought till after the bankruptcy. A verdict was given for the Plaintiff at the sittings after last *Hilary* term, since which the Defendant had obtained his certificate.

Shepherd

1806.

WHITE v. PRINGLE.

Shepherd Serjt. shewed cause. The question in this case is, whether the bail are entitled to be exonerated from their liability to the costs of the action, as well as the original debt. If the Defendant would be entitled to be discharged out of custody, supposing him to have been surrendered by his bail, the Court would exonerate the bail to avoid circuity. The question therefore is, whether both debt and costs are proveable under the commission? for if proveable they are barred by the certificate, but not otherwise. In this case the costs could not have been proved under the commission. The result of all the cases is this; whether the demand be in the nature of a liquidated debt, or only sounds in damages; if ascertained by verdict before the bankruptcy, the taxation of costs will refer to the verdict, and the costs may be proved; and if a nonsuit take place before the bankruptcy, though judgment be not signed till afterwards, the costs will relate to the nonsuit and are proveable: but where the verdict is not obtained till after the bankruptcy, there is no case in which the bankrupt has been relieved from the costs on the ground of his certificate; and the Court of Chancery has refused it. In the case of *Lewis* v. *Percy*, 1 *H. B.* 29. the point was conceded without argument by the Plaintiff's Counsel, who relied upon an objection to the certificate. But in a subsequent case in the Court of Chancery, *Ex parte Hill* (*a*), Lord Chancellor *Eldon* says, the point was given up

(*a*) Sittings in *Lincoln's Inn Hall*, before *Michaelmas* term, 3d *November* 1802.

Ex parte HILL.

Copland and *M'Knight* jointly purchased a quantity of rum. This they pledged with the petitioners, who lent their money on it, and in fact to pay for it. They had no other dealings together as partners. Rum fell in value. The rum pledged was sold, and did not produce the amount of the money lent. The petitioners brought a joint action, in which *M'Knight* let judgment go by default. *M'Knight* and *Copland* both became bankrupts under separate commissions, and the commission against *M'Knight* was dated the 31st *May*, but a verdict was recovered against him by the

1806.

WILLETT v. PRINGLE.

up in *Lewis* v. *Piercy*; and, after going through all the authorities, he decided that the costs of an action where the verdict was after the commission could not be proved. According

Petitioner on tho 26th of *June* last for 2287*l.* 6*s.* 2*d.* the amount of the monies due after deducting the produce of the rum. The time of the sale of the rum did not appear. The commissioners under *Copland's* commission considered this as a joint debt, and refused to admit the proof of it except for the purpose of assenting to, or dissenting from the certificate.

The Petitions prayed that the commissioners, acting under the said commission against *Robert Copland* might receive the proof of the amount of the Petitioner's debt and costs, when taxed, and that the Petitioner might be paid dividends thereon, rateably with the other creditors of the said *Robert Copland*. The two points raised were, 1st, that there was no joint estate, and therefore that the debt ought to be proved against each separate estate. *Ex parte Haydon, Cooke, Bank. Laws.* 240. 2dly, That the debt, was a debt which might have been proved before the verdict, and therefore that the costs ought to be proved, though the verdict was after the commission. *Lewis* v. *Piercy*, 1 *H. Bl.* 29. *Watts* v. *Hart*, 1 *Bos. & Pul.* 154.

On the other side it was said that here was a joint estate, viz. the goods pledged. 2dly, That the general rule is that where the verdict is after the commission, costs cannot be proved, that the point was not made in *Lewis* v. *Piercy*, and that the case was given up by Serjt. *Bond*; and though the Defendant there was discharged, it does not follow that the costs could be proved.

Lord Chancellor Eldon. The case *ex parte Elton*, 3 *Ves. jun.* 238. has settled the matter, and therefore I will not unsettle it, but should rather have adhered to Lord *Thurlow's* rule. But when there are no joint effects, that takes the case out of *Ex parte Elton*. Joint effects means such as are under the administration of assignees to distribute, not as in this case, where the only joint effects were those pledged to the petitioners, to more than the amount. *Copland* became a bankrupt on the 31st May. The action was brought before verdict the 16th June. Subsequent to the verdict the costs were taxed. The question is if costs are proveable. The ground put by Mr: *Cullen* is, that the debt was antecedent, therefore the costs incident, and by relation due before the commission. That statement contradicted my general notions. I had then not recollected any case of a certificate discharging the costs. It is a different case whether a certificate does discharge, or a debt is proveable (The Lord *Chancellor* here read Mr. *Cullen's* sec. on Costs, p. 104.) The case *Ex parte Todd*, 3 *Wils.* 270, was determined by Lord *Northington* on great consideration. This is not referred to in subsequent cases. If that authority is displaced by subsequent judgments, it is displaced without consideration of this authority. The next proposition is, (here he reads proposition as to proving costs after verdict). There are two cases contradicting this; *Ex parte Todd*, and *Walter* v. *Sherlock*, 3 *Wils.* 272. one of them is never referred to in arguing the subsequent cases. Then

follow

According to this authority the debt is proveable under the commission, but the costs are not. There can be no difficulty in severing the costs from the debt. If to an action

follow the propositions as to nonsuit, *scire facias*, and liquidated debts. If it is meant by those propositions that a bankrupt has been discharged in such cases, that is a fact. If it is to be concluded from them, that costs have been ordered to be proved, I know of no such principle The next proposition relates to cases where the bankrupt is discharged, though there is no debt before the bankruptcy, and a case is put off, actions commenced afterwards; I concur with him in this case. In the case *Ex parte Sneaps*, *Cooke's Bank. Laws*, 192. Lord *Thurlow* declared on great consideration that costs in equity, if not taxed before bankruptcy, were not to be proved, not on the ground of its being discretionary, for he held the order analogous to judgment, and his notion was that Lord *Henley's* judgment was right. The cases are collected in a book of great merit, *Hullock* on Costs. The author there draws the inference, that, because the debtor is discharged by certificate, therefore they are proveable. From what appears in *Co. Bank. Laws*, nothing seems to have satisfied Mr. *Cooke's* mind that costs on a verdict after bankruptcy could be proved. Mr. *Cullen* has found himself in a difficulty from some circumstances, which I shall state, and the difference between being discharged and proving; I state the history for the consideration of Mr. *Roupell* and Mr. *Bell*, rather than as a final judgment. In *Ex parte Todd* and *Walter* and *Sherlock*, it was held that damages were not proveable as they were not liquidated, and therefore not proveable. These cases seem not to have been referred to in subsequent decisions, as in *Lewis* v. *Piercy*. The case of *Boutflower* v. *Coats*, *Cowp.* 25. cited there, has no relation to it. And *Graham* v. *Benton*, 1 *Wils.* 41. is no authority, as the verdict was before the bankruptcy. One of the counsel (Serjt. *Kirby*), in *Lewis* v. *Piercy*, put the case on this fact, that costs were part of the original debt. The other counsel (Serjt. *Bond*), gave it up. The Court seems to have been of opinion that the man should be discharged. No opinion was given whether the costs could be proved. In *Langford* v. *Ellis*, 1 *H. Bl.* 29. *n. Graham* v. *Benton* was cited properly, and the proposition was made, that if the debt is ascertained by the verdict, then it is to be proved, but the question whether the debt is ascertained by the verdict, is left untouched? Lord *Henley* was of opinion that it was not ascertained. *Walter* v. *Sherlock*, is also expressly in point to that effect. *Blandford* v. *Foote*, *Cowp.* 138. was also cited; in *Langford* v. *Ellis*, it was contended that the costs followed the verdict: Mr. *Balguy* took a distinction between existing debts, at the time of bringing the action, and a mere right to recover damages. *Willes* J. says, there is no distinction between a tort and a contract, where a judgment follows the verdict. Mr. *Balguy's* distinction, however, seems to me to be right; and that in that case the costs were not ascertained, or liquidated. The authorities are contrary. In *Blandford* v. *Foote*, the question was not, whether the debt could be proved, but whether the bankrupt should

1806.

WILLETT v. PRINGLE.

action on the judgment, the bankrupt should plead his certificate, the Plaintiff might reply that it was a bar to the debt, but not to the costs; or the Plaintiff might declare on the judgment for the costs only. Suppose after judgment the Defendant should pay the debt, the Plain-

should be discharged, and none of the prior cases were cited or looked at. If it is to be contended, that subsequent interest and costs are to be proved, some regulations must be made. The rule is (I understand) to stop interest under the commission subsequent to it. There is indeed an exception in case of a surplus, in which case interest is to be paid not under a proof, but under an equitable right. That was first held in Sir *Steph. Fran*'s case. In this case (*Blandford* v. *Foote*) interest is given upon the judgment, and therefore interest upon interest. The proposition contended for, however, is not to the full extent, that a debt discharged is provable. It is the practice to stop subsequent interest under a commission, yet that arises from prior contract. *Blandford* v. *Foote*, therefore, does not prove that the interest and costs should be proved. *Boulfield* v. *Coats* does not apply. In *Hurst* v. *Mead*, 5 *T. R.* 365, the question was whether the certificate discharged the Bankrupt from those costs. Mr. *Roupell* insists that the Plaintiff might have proved the debt, and cites *Blandford* v. *Foote*. But it was not said in *Blandford* v. *Foote*, as stated by him, that the debt could be proved. Lord *Kenyon*, in *Hurst* v. *Mead*, says, The taxation of costs was merely the ascertaining the amount of the debt, but the debt existed previous to the bankruptcy. This is the proposition which Lord *Henley* and Lord *Thurlow* denied, and which was denied in *Walter* v. *Sherlock*. *Hurst* v. *Mead*, goes to this, that a nonsuit constitutes a debt only wanting ascertainment; but *Bulle*r, J. alluded to a case in the Common Pleas, viz. *Lewis* v. *Piercy*. Then follows the case of *Watts* v. *Hart*. Lord Ch. J. *Eyre* says, the case of *Lewis* v. *Piercy* must have been decided on this ground, that there was an actual debt, which existed before the bankruptcy, and though not converted into a judgment, might have been proved under the commission independent of the action, and being so provable, the subsequent proceedings might be considered as incident, and as nothing when separated from the subject to which they were incident, and therefore might be proved. I cannot agree to this proposition until proved by the most clear authorities. Lord Ch. J. *Eyre* speaks of favour, why favour on the construction of an act of parliament? There is strong authority to discharge a bankrupt, but the question here is not if the certificate will discharge; but if there can be proof. For the discharge there are authorities though perhaps proceeding on mistake, and taken up without attention to authority, costs are not ascertained, nor ever an adjudged demand till verdict; there is no authority for this; Mr. *Mansfield* said, it does not create an ascertained nor even a certain debt, for if the party dies, judgment cannot be entered up as where a judgment is obtained. Decision that the costs could not be proved.

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tiff would still be entitled to proceed for the costs. So the bankrupt's certificate is a discharge of the debt, and tantamount to payment of it, but cannot affect the Plaintiff's right to the costs.

Best, Serjt. *contrà*. If the bankrupt be not discharged from the costs, he will be subject to the greatest hardship. The action was not commenced till after the commission had issued, and if creditors are at liberty to bring actions at law against the bankrupt after the commission, and subject him to the costs, he may have more costs to pay than the amount of all his debts, notwithstanding the debts may be all proveable under the commission, and afterwards barred by his certificate. The case of *Lewis* v. *Piercy*, is in point. The Court expressly gave their opinion that the costs were barred by the certificate. Where the debt is proveable under the commission the costs have reference to the debt, and are consolidated with it. Upon this principle, the Court of King's Bench, in *Phillips* v. *Brown*, 6 *T. R.* 282, held that the costs of a *scire facias*, brought after bankruptcy to revive a judgment before, and the costs of a writ of error brought after bankruptcy to reverse a judgment before were barred by the certificate, Lord *Kenyon* saying "as the writ of error springs out of the original debt, which is the *substratum* of the whole, the certificate which discharges the bankrupt from the original debt, also discharges him from the costs of prosecuting the writ of error: the *scire facias* was sued out by the Plaintiff, to enable him to reap the fruits of his judgment; it was a step to lead to execution for his original demand, and the Defendant being discharged as to the original judgment, all the means that conduce to that end must be considered as consequential upon and included in the original demand." Such being the opinion of the Courts of King's Bench, and Common Pleas, upon a

1806.

WILLETT v. PRINGLE.

point of statute law, the decisions of these courts of common law, are to be attended to rather than the authority of the Court of Chancery.

Sir J. MANSFIELD, Ch. J. Where a man brings an action against a bankrupt, after a commission has issued, he takes the chance of losing his costs, in case the debt should be barred by the certificate. I cannot distinguish the costs from the debt; if the bail are discharged from the one, I think they cannot remain liable for the other.

CHAMBRE J. No costs had accrued at the time when this debt is to be considered as discharged.

The Court took time to consider of their opinion, and on this day,

Sir J. MANSFIELD Ch. J. said, That the court had determined that the costs followed the debt, and made the Rule absolute.

June 7th.

HILL, Assignee of WHITE, a Bankrupt, v. HEALE and Others.

A commission of bankrupt sued out upon the affidavits of four petitioning creditors, whose debts do not appear upon the face of those affidavits to amount to 200*l*, is not void, the provision in the act 5 Geo. 2. c. 30. s. 23. respecting such affidavits being directory only, and not conditional.

THIS was an action for money had and received by the Defendant to the use of the Plaintiff, as assignee of *George White* a bankrupt. At the trial before Sir *J. Mansfield* Ch. J. at the *Guildhall* Sittings after last *Hilary*

1806.

HILL v. HEALE.

term, the Plaintiff having first established the trading and act of bankruptcy, proved debts due to the petitioning creditors, who were four in number, to the amount of above two hundred pounds, and that the Defendants, after the bankruptcy, had received from the bankrupt the sum of 139*l.* In order to defeat the bankruptcy, the Defendants produced the affidavits of the petitioning creditors, sworn before a Master in Chancery previous to the issuing the commission, in which it was stated, that the bankrupt was indebted to the first petitioner in the sum of 50*l.* and upwards, to the second in the sum of 50*l.* and upwards, to the third in the sum of 60*l.* and upwards, and to the fourth in the sum of 39*l.* and upwards. Upon this it was insisted, that as debts to the amount of 200*l.* had not been sworn to before a Master in Chancery previous to the issuing the commission pursuant to the 5 *Geo. 2. c. 30. s. 23.* the commission was void, and the Plaintiff ought to be nonsuited.

A verdict was taken for the Plaintiff, damages, 139*l.* subject to the opinion of the Court upon the validity of this objection.

Accordingly a rule having been obtained, calling on the Plaintiff to shew cause why the verdict should not be set aside and a nonsuit be entered,

Vaughan and *Bayley*, Serjts. shewed cause. That part of the 5 *Geo. 2.* which requires that an affidavit of the petitioning creditor's debt should be made previous to the issuing of the commission is merely directory, and does not amount to a condition precedent. The commission, therefore, is not void. Though it may have been irregularly issued it can only be set aside by application to the Great Seal. Before the 5 *Ann. c. 22.* (*a*) it was not necessary that the person upon whose petition the commis-

(*a*) *Ruffhead's Statutes, Appendix.*

sion

1806.

HILL v. HEALE.

sion issued should be a creditor, as was decided in *Smith* v. *Blackham*, 1 *Ld. Ray.* 724. That statute provides that no commission shall issue upon the petition of any creditor "*unless* the single debt of such creditor shall amount to 100*l.* or upwards, or *unless* the debt of two creditors so petitioning as aforesaid shall amount to 150*l.* and upwards, or *unless* the debt of three or more creditors so petitioning as aforesaid shall amount to 200*l.* and upwards." The statute then proceeds, without repeating the word 'unless,' "And the creditor or creditors petitioning for such commission shall, before the same be granted, give bond to the Lord Chancellor, &c. for proving his or their debt or debts, and also for proving the party a bankrupt." This statute is nearly the same as that of the 5 *Geo. 2. c.* 30. *s.* 23., except that the latter statute directs "that the creditor or creditors petitioning for such commission shall make an affidavit or affirmation of the reality of the debt or debts;" but this direction, like that contained in the 5 *Ann.*, is not introduced by the word "unless," but by the word "and," and then proceeds "*likewise* give bond to the Lord Chancellor," &c. The existence of the debts, therefore, is a condition precedent, without which the commission would be void; but the provisions requiring the affidavit and bond are only to regulate the conduct of the Chancellor previous to the issuing the commission. When the commission is issued, the affidavit is *functus officio*: it proves nothing; the creditor must again prove his debt before the commissioners, and, after that, at a public meeting. If the affidavit is to be considered as a condition precedent, a commission of bankrupt may be overturned upon as many objections as has been allowed respecting affidavits to hold to bail; but it never has been considered that such affidavit was necessary to support the commission. It never has been the practice to produce such an affidavit to the commissioners on opening the commission,

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1806.

HILL v. HEALE.

or to prove it upon a trial where the bankruptcy is in issue: yet if the construction contended for by the Defendant be correct it is not only necessary to prove the affidavit in both these cases, but also the bond to the Chancellor, and no commissioner, messenger, or other person acting under the commission, can be considered safe without looking to the regularity of these proceedings. In *Wiskard* v. *Wilder*, 1 *Burr.* 330, it was determined, upon a demurrer to a declaration upon the bail-bond, that the 12 *Geo.* 1. *c.* 29., which prohibits arrests under 10*l.*, and directs an affidavit of the debt to be made, does not make the affidavit a condition precedent, but is only directory to the sheriff, and that the bail-bond is good, though no such affidavit be made.

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Cockell and *Best*, Serjts. *contrà*. The Chancellor has no power to issue commissions of bankrupt, except by virtue of the authority given to him by act of parliament. The statutes respecting bankruptcy being all in *pari materiâ* must be taken together and construed as one act, and unless the power given by those acts be strictly pursued, the commission will be void. The object of the 5 *Ann.* and 5 *Geo.* 2. was to prevent commissions of bankrupt being taken out maliciously, as appears by the preamble. To effect this purpose the former statute provides that before the issuing the commission a bond shall be given by the petitioning creditor to be conditioned for proving his debt, and proving the party a bankrupt. But this not being thought sufficient, the latter statute provides that the petitioning creditor shall actually prove his debt by affidavit before any person shall be put in jeopardy by a commission of bankrupt against him. The word "unless," therefore, must be considered as governing the whole clause, and restraining the authority of the Chancellor to issue commissions except in the cases specified. It is true that the commissioners never inquire into the

1806.

HILL v. HALF.

existence of the affidavit, for they presume that the Chancellor has acted rightly, and the commission is good evidence that the previous steps have been taken, until the contrary be shewn. Thus a patent for a new manufacture is *prima facie* evidence that the patentee was the first inventor; but if the contrary be shewn, the patent will be avoided, it being a condition precedent that the patentee be the first inventor. The case of *Wiskord* v. *Wilder* is no authority upon this occasion, for that case only decided that it was not necessary to aver in the declaration that the sum was sworn to. The statute of 12 *Geo.* 1. *c.* 29. *s.* 2. having expressly provided that the sheriff shall take bail for the sum sworn to and indorsed on the writ, "and for no more," the Judges never could have intended to decide that a bail-bond taken for a sum not sworn to could be valid. With such a defect in the proceedings as appears in the present case, it is impossible to suppose that any conviction of the bankrupt upon the criminal parts of the bankrupt laws could take place.

Sir JAMES MANSFIELD, Ch. J. This objection arising out of the clause in 5 *Geo.* 2. is now made for the first time. In the course of my practice I never heard of it, and upon enquiry I do not find that it was ever before thought of. It never has been thought necessary to prove before the commissioners the existence of a proper affidavit; yet it certainly would be necessary for them to investigate that matter if the want of an affidavit in due form made the commission void; for by opening the commission without a proper affidavit they would expose themselves to actions, and subject the assignees to serious inconvenience. I agree that for want of a proper affidavit the commission in this case has been irregularly issued; but it never has been supposed that an irregularity made the commission void, though it might afford a ground of application to the Great Seal to set the commission aside. Such

Such having been the practice, the question is, Whether, according to the words of the 5 *Geo.* 2., the commission is not only issued irregularly, but is absolutely void? We are all of opinion, that that part of the clause which requires an affidavit to be made, does not constitute any such condition; and that the omission to comply with it does not make the commission void, though it may afford a ground of application to the Chancellor, either to set aside the commission or to stay proceedings till proper affidavits be made. To hold the contrary would be to adopt a very strained construction; the former part of the clause which regulates the amount of the petitioning creditor's debt, clearly comes under the word "unless;" but the word stops there, and not being repeated in the other parts which relate to the affidavit and the bond, it cannot be supplied. It is true that the clause contains a direction to the Chancellor, which ought to be observed; but when the commission has issued, the affidavit is of no further use, the debt must be proved before the commissioners, and also upon a trial, if the commission be disputed. If the creditor fail in proving his debt, the bond may be assigned, but there is no provision which allows the bond to be assigned if no affidavit be made; which seems to imply that the omission to make such affidavit will not render the commission void. Without entering, however, into minute observations on the clause, it appears that the affidavit was required merely by way of caution to prevent commissions from being too hastily issued. The case in *Burrow*, which has been referred to, does not appear to me to apply to this, though the *dictum* which it contains does. The question there related to the form of the declaration. Mr. Justice *Denison*, who was a pleader of the first eminence, observed, that in practice the form of the declaration was sometimes one way and sometimes another, and that he did not think the averment necessary. This was the sole question before

1806.

HILL v. HEALE.

fore the Court. But I should have great difficulty in agreeing with the doctrine imputed to the Court of King's Bench, that the statute of 12 *Geo.* 1. is merely directory. I cannot help entertaining great doubts respecting that *dictum*. The sheriff must see by the writ whether it be indorsed or not, and I cannot think he could justify an arrest without it. But this was merely a *dictum*, and not necessary to the opinion of the Court. In the present case, considering what has been the practice, especially before commissioners of bankrupt, and attending to the fair construction of the statute, I think that the commission is not void for want of a sufficient affidavit.

HEATH J. I think that the statute of 5 *Geo.* 2. differs very essentially from the statute of 21 *Jac.* 1. *c.* 3. respecting monopolies. The statute of *Jac.* 1. creates a condition, though it lies upon the person who would impeach the patent to shew the breach of it; but the language of the latter part of the clause varies materially from that of the first part. The provisional words do not extend to the latter part, which is merely directory, and has so been always considered in practice. If the latter part contain any condition it is a condition precedent, and I can see no reason why proof of it should not be required upon every commission of bankrupt. Usage is the best expositor.

ROOKE J. I entirely concur in the construction of the statute, which has been already so well stated, and the general usage from the time of passing the act agrees with that construction. The question is, How the bankrupt is to get relief, if the affidavit be insufficient? Now, where can this application be so properly made as before the Lord Chancellor, in whose Court the commission issues? and the words of the statute appear to me strongly to

to favour this construction. They direct that before the commission issues an affidavit shall be made. If then a commission be sued out without it, the parties should apply to the Chancellor for relief.

CHAMBRE J. I quite agree with the rest of the Court, and I think that the language of the act is strongly in favour of the opinion which has been delivered. If the terms of the act had been such as to introduce a condition precedent, it must have been complied with; but the phrase being changed, and the conditional word dropped, the Court is at liberty to construe the clause as directory or conditional according to the nature of the thing, which appears to me to be matter of form, and not essential to the validity of a bankruptcy, a circumstance which it has always been deemed material to attend to in determining whether a clause be directory or not. The affidavit is of no use in any period subsequent to the commission; it is not even *primâ facie* evidence of the debt. In this respect the statutes of bankruptcy differ from the acts respecting monopolies, for the patent is *primâ facie* evidence of some things, but the debt must be proved before the commissioners, and in all actions where the commission is in issue. On this ground alone, therefore, I should think that we are at liberty to consider the clause as directory, unless great inconvenience would ensue: but the inconvenience is all the other way; the commissioners would be involved in great peril if commissions were liable to be overturned for defects in the affidavit. The difficulties supposed to follow from supporting the commission are all imaginary. With respect to the liability of the bankrupt to a criminal prosecution, he has the opportunity of obtaining redress by applying to the great seal; and if he has neglected the opportunity of making such application in due time, still he will be in no danger of being hurt, since the existence of a petitioning creditor's

1806.

HILL v. HEALE.

ditor's debt must be proved in every criminal proceeding against him. It is far more convenient for the whole body of creditors that the commission should stand; and I am not aware of any inconvenience which could arise from supporting it. It is said that the Chancellor acts under a special authority, which he cannot exceed. But the distinction between provisions which are directory and those which are conditional prevails even in matters relating to inferior magistrates. But this is the case of the first law officer in the kingdom. Where certain acts are directed to be done near to any place, the provision is considered as directory, and the act will not be void though the direction be not strictly complied with. It does not appear to me that the existence of an affidavit is made a condition precedent to the validity of the commission, but I think that the commission is good till superseded by proper authority.

Postea to the Plaintiff.

1806.

(IN THE EXCHEQUER CHAMBER.)

ATKINS and Another *v.* WHEELER and Another, in Error.

June 11th.

In trover for bills of exchange, the Court of Exchequer-chamber allowed interest from the date of the final judgment upon all such bills as had been received before the judgment, and upon all such as had been received afterwards from the time of the receipt.

TROVER for certain bills of exchange.

Judgment for the Plaintiff below having been affirmed on a writ of error in this Court,

Richardson moved that it might be referred to the officer to compute the interest upon the amount of the bills which were the subject of the action, and that it might be added to the sum recovered below; he produced an affidavit stating that the action was brought for bills amounting to 8000*l.*; that final judgment below was signed on the 19th of *November* 1805 for 8049*l.* 10*s.*, before which time the amount of all the bills, except three, had been received by the Defendant below, and that the amount of the remaining three being 1666*l.* 13*s.* 4*d.* was received by the Defendant on the 16th of *January*; he stated that the reason why the action was commenced in trover was, that the bills were not all due at the time when the writ was sued out, but that if the action could have been brought for money had and received, the Plaintiff would have been entitled to recover interest by way of damages below; that the statutes which empower the Courts of Error to give damages extend to all personal actions. 3 *Hen.* 7. *c.* 10. 19 *Hen.* 7. *c.* 20. 3 *Ja.* 1. *c.* 8. and 13 *Car. st.* 2. *c.* 2.: all which are mentioned and commented upon in *Shepherd* v. *Mackreth*, 2 *H. Bl.* 284.; and this inference drawn from them, that the Court has power in all cases to allow interest; that in the case of *Walker* v. *Bayley*, 2 *Bos. & Pul.* 219. where the Court refused to give interest upon an attor-

1806.

ATKINS and Others v. WHEELER and another in Error.

ney's bill, it was not intended to deny the power of the Court, though it was not thought proper in the particular case to allow the application; that in *Lord Lonsdale* v. *Littledale*, 2 *H. Bl.* 267. interest had been allowed in a case of tort, and that as the interest in this case greatly exceeded the costs, it was evident that the writ of error had been brought for the purpose of retaining the money.

The Court thought it reasonable, that interest should be allowed on all the bills except 1666*l.* 13*s.* 4*d.* from the date of the final judgment below, and on that sum from the 16th of *January*, and made an order accordingly.

June 12th.

KING *v.* GLOVER.

An insurance on the "commission, privileges," &c. of the Captain of a ship in the *African* trade is legal.

THIS was an action by the Plaintiff as widow and representative of her husband Capt. *Ch. King*, who commanded the ship *John*, employed in the slave-trade, and was commenced by her for the recovery of a loss upon a policy of insurance effected by her husband "on his commissions, privileges, &c. as may be hereafter valued." The insurance was "at and from *Liverpool* to the coast of *Africa* and *African* islands, and at and from thence to all ports and places of touching, discharge, sale, and final destination in the *British* and foreign *West Indies*, the *Bahamas* and *America*, all or either, with liberty to exchange slaves and goods with any other vessel or vessels." The Plaintiff having obtained a verdict on this policy at the *Guildhall* sittings after last *Hilary* term, a rule was granted to the Defendant in the ensuing term, calling on the Plaintiff to shew cause why that verdict should not be set aside, and a nonsuit or a new trial be had.

1806.

KING v. GLOVER

had. The rule was moved on several points, but the only objection which it is material to notice here was one made to the Plaintiff's recovery on the ground of the insurance being illegal and falling within the authority of *Webster* v. *De Tastet*, 7 *Term Rep.* 157. as being on the captain's "commissions, privileges, &c." As to which description of interest it appeared that Capt. *Ch. King*, besides his wages, was entitled for his trouble and attention in purchasing slaves on the coast of *Africa*, and selling and disposing of them in the *West Indies*, to 2*l. per cent.* on the gross sales, and 4*l.* for 110*l.* after deducting the above 2*l. per cent.* and the other officers, privileges and commissions; and that this additional remuneration was the subject of the present insurance.

Shepherd and *Bayley* Serjts. now shewed cause, and contended that the captain's "commission and privileges" were not wages, but something in addition to wages, and consequently that such a remuneration to him for his extra trouble and attention in the management and disposal of the slaves was a good subject of insurance; they observed that he acted in the double capacity of captain and supercargo, for the former of which employments he received wages, for the latter this additional compensation: and that whatever doubt might be entertained as to his being allowed to insure in one character, there could be none as to his being entitled to insure in the other: that if a captain was not permitted to insure such an interest as this, he ought not to be permitted, when he happened to be a part owner, to insure his share in the ship, since he might be supposed to be likely to be more careless of the remaining interests in the ship when his own was insured; and yet no such objection could prevail in law to such an insurance; and that indeed no case had been cited to shew that a captain of a ship could not insure his wages, though

1806.

KING v. GLOVER.

slaves. The captain's "commission and privileges," therefore, appear to me to be the subject of a legal insurance.

CHAMBRE J. The common law follows the marine law in not allowing wages to be due till the safe arrival of the ship. This rule applies to the mariners, but there is no decision in the marine law prohibiting the captain from recovering his wages up to the time his ship is captured. Indeed the captain and the mariners are treated as very different subjects of consideration in the marine law; the former are supposed to be persons of trust and confidence with the owners, and to be bound to them by the terms of their contract, nor is there any fear that they will run away or desert; and so far is the idea of personal trust and confidence between the owners and the master carried, that the latter has not, as the mariners have, the choice of proceeding against the ship in the Admiralty, or suing at law, but must pursue his remedy at law; moreover he is considered *quasi* owner himself, and liable to be tried. Indeed, considering that the captain may pay himself, if he has money in hand, it is probable that we should have many cases in the books of actions to recover back money retained by captains for wages due before capture, if their payment depended, like that of the mariners, on the safe arrival of the ship. This insurance therefore appears to me to be legal.

Rule discharged.

1806.

June 14th.

ARROWSMITH *v.* LE MESURIER.

If a magistrate's warrant be shewn by the constable who has the execution of it to the person charged with an offence, and he thereupon, without compulsion, attends the constable to the magistrate, and after examination is dismissed, it seems that no such an arrest has been made as will support an action for false imprisonment.

THIS was an action of trespass for assault and false imprisonment. At the trial before *Grose* J. at the last assizes for the county of *Suffolk*, it appeared that a warrant having been granted by a magistrate, for apprehending the Plaintiff upon a charge of a conspiracy to sue out a fraudulent commission of bankrupt, a constable went with the warrant to the Plaintiff's house and shewed it him; that after conversing some time with the constable the Plaintiff desired to have a copy of the warrant, which the constable permitted him to take: after which the Plaintiff attended the constable to the magistrate, and after being examined upon the subject of the charge, was dismissed, about six hours after the time when the warrant was first shewn to him: that the constable never touched the Plaintiff, and that due notice of the action had been given.

The Jury having found a verdict for the Defendant, a rule was obtained calling on the Plaintiff to shew cause why that verdict should not be set aside, and a new trial be had.

On this day *Sellon* Serjt. being called upon to support the rule, contended, that it was not necessary that the Plaintiff should be touched in order to constitute an arrest; that the Plaintiff having gone before the magistrate in obedience to the warrant must be considered as having been arrested, and consequently the Plaintiff was entitled to a verdict.

Sir JAMES MANSFIELD Ch. J. I can suppose that an arrest may take place without an actual touch, as if a

1806.

ARROWSMITH v. LE MESURIER.

man be locked up in a room (*a*); but here the plaintiff went voluntarily before a magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the Plaintiff. How can a man's walking freely to a magistrate prove him to be arrested. I think that the jury have done justice.

The other Judges concurring,

Rule discharged (*b*).

(*a*) In *Williams* v. *Jones*, *Ca. temp. Hard.* 301. Lord *Hardwick* says, It does not follow that an arrest cannot be made without touching the person, for if a bailiff comes into a room and tells the Defendant he arrests him, and locks the door, that is an arrest; for he is in custody of the officer.

(*b*) In *Dalton's Justice*, c. 170. it is said, "if the constable or other officer upon a warrant received from a justice of peace, shall come unto the party, and require or command him to come or go before a justice, &c. this is no arrest or imprisonment." The editor, indeed, of the edition 1742 adds, "bailiff or sheriff says to a man, being present, I arrest you, although he touch him not, this is a good arrest; and if the party go away, it is a rescue;" for which he cites Sir *James Wingfield's* case, 8 *Car.* 1. *B. R.* This doctrine, however, is contradicted by the case of *Genner* v. *Sparks*, 1 *Salk.* 79. in which the Court held, that bare words would not make an arrest, and the Court refused an attachment for a rescue against one who had kept off a bailiff with a fork till he retreated into his own house; but said, that the bailiff might have an action for the assault. Sir *James Wingfield's* case is reported in *Cro. Car.* 251. and appears to be an information by the *Attorney-General* for an assault and rescue, in which it was proved upon the evidence that Sir *James* drew his sword and wounded the sheriff grievously.

1806.

SCOTT *v.* BOURDILLION.

June 14th.

Rice is not corn within the meaning of the memorandum of a policy of insurance.

THIS was an action on a policy of insurance, which was tried before Sir *James Mansfield* Ch. J. at the *Guildhall* Sittings after *Easter* Term.

The only question was, Whether *rice* was to be considered as *corn* within the memorandum of the policy, which exempts the underwriters from a partial loss? and the usage having been proved to be against so considering it, the jury found a verdict for the Plaintiff.

A rule having been obtained calling on the Plaintiff to shew cause why this verdict should not be set aside,

Best Serjt., in support of the rule, contended, that if rice were capable of being brought within the word "corn," as it was liable to all the same inconveniences, the memorandum ought to be construed to extend to it.

But Sir JAMES MANSFIELD Ch. J. said, that in cases like this the common sense of the words ought to decide unless a clear usage to the contrary were shewn; that the evidence produced at the trial was all one way, and tended to shew that rice was not to be considered as corn within the meaning of the memorandum, and that no person reading the memorandum would be apprised that rice was intended to be exempted by it from partial loss.

The other Judges concurring,

Rule discharged (*a*)

(*a*) In *Mason* v. *Skurray*, *Park. Ins.* 12. 116. it was determined, that pease and beans were included in the word "corn."

1806.

June 16th.

Roe d. Helling *v* Yeud

Testator after directing his debts and funeral expences to be paid by his executors, and making several bequests of annuities and money, gave to his five grandchildren, whom he appointed executors, "all the remainder of my property what ever and where soever, to be divided equally, share and share alike, after their paying and discharging the before-mentioned annuities, legacies and demand or any I may hereafter make by codicil to this my will, all my goods, stocks, bills, bonds, book-debts and securities in the Witham Drainage in Lincolnshire, and funded property." Held that his real estate did not pass under the residuary clause.

THIS was an ejectment for certain messuages and lands in the county of *York*. The cause was tried before *Rooke J.* at the last assizes of *York*, when a verdict was found for the lessor of the Plaintiff, subject to the opinion of the Court upon the following case:

William Forbes being seised in his demesne as of fee of and in certain estates in *Yorkshire*, mentioned in the declaration, and possessed of considerable personal property, consisting of goods, stock upon his farm, bills of exchange, bonds, book-debts, and securities in the *Witham* Drainage in *Lincolnshire*, and funded property, made his last will and testament in writing duly executed to pass real estates in the following words. "In the name of God. Amen. I *William Fores* of the parish of *Barnby Dunn* in the county of *York*, yeoman, do in my own hand-writing make and ordain this my last will and testament in manner and form following: first, I will that all my debts and funeral charges be paid by my executrixes and executor hereinafter named. Item, I give to Mrs. *Mary Mathews* of No. 1. *Dragon Yard*, opposite *White Chapel* church, 200*l.* of my 5 *per cent.* annuities, the interest for her to receive during her life, and the principal to go to her heirs after her decease. Item, I give to my brothers *John* and *Richard Rothwell*, upholsterers, of *Manchester*, 100*l.* to each of them. Item, I give to my three nieces, that is, my niece *Alice Holt* of *Bury*, her sister *Scholes* of *Bury*, and their sister *Leigh* near *Manchester*, 100*l* to each of them. Item, I give to *Ann Parkin* for her long, diligent, and faithful service, 20*l.* a-year during her natural life. Item, I give to the five grandchildren of my late uncle *Mark Fores*, four daughters and one son, namely, *Sarah Hale*, No. 1. *Paradise Place*, *Stockwell*, *Surry*, her sister the wife of *Yeud*, gentleman, their sister the

wife

1806.

Rod. HELLING v. YEUD.

wife of Mr. *Swift* of *Brunswick-Street, Liverpool*, their other sister *Catherine Helling*, spinster, and their brother *Edward Helling* of No. 11, *Featherstone Buildings, Holborn*, all five of whom I constitute and appoint my executrixes and executors, and to whom I give all the remainder of my property whatever and wheresoever, to be divided equally amongst them, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, debts and demands, or any I may hereafter make by codicil to this my will, *(a)* all my goods, stock, bills, bonds, book-debts, and securities in the *Witham* Drainage in *Lincolnshire*, and funded property. In witness," &c. The said *William Fores* died so seised and possessed, as aforesaid, on the 13th of *September* 1805, without having in any manner revoked or altered his said last will and testament. The lessor of the Plaintiff is one of the residuary legatees or devisees in the said last will and testament of the said *William Fores*, and is also heir at law of the said *William Fores*. *Ann* the wife of *William Yeud* the defendant is the person mentioned in the will under the description of the wife of *Yeud*, gentleman, and is in the receipt of the rents and profits of one undivided fifth part of the premises mentioned in the declaration, in the possession of a tenant for whom they are admitted to defend.

The question for the opinion of the Court was, whether the testator's real estate passed by his will, or descended to his heir at law? If the former, a verdict was to be entered for the Defendants: and if the latter, a verdict was to be entered for the Plaintiff.

Bayley Serjt. for the lessor of the plaintiff. I contend, that the real estate did not pass under the will, but descended to the heir at law. The will contains no introductory

(*a*) It seems that the words beginning at "all five of whom," and ending with "this my will," are to be construed as included in a parenthesis.

1806.

ROE d HELLING v. YEVD.

ductory clause indicating an intention to dispose of real estate, nor is any mention made of lands throughout the will. The only word by which the real estate can be affected is the word "property" in the residuary clause. It may be admitted that the word property standing alone would carry real estate, but in this case it is restrained to personalty by the words "all my goods, stock, bills, bonds, &c. which follow." Those words must either be considered as explanatory of the word property, or as giving something else. Now these words cannot carry more than is comprised in the word property; they must therefore be considered as explanatory, and are to be taken in the same light as if the testator had said, viz. all my goods, stock, bills, &c. In *Markant* v. *Twisden*, 1 *Eq. Cas. Abr.* 211. *Gilbert*, 70. a testator after giving pecuniary legacies only, gave to his wife all the rest and residue of his estate chattels real and personal, and the Lord Keeper held that the reversion of the lands settled on his wife for life did not pass; that the rest and residue of his estate must be confined to such estate as he had before given, and that the words "chattels real and personal" explained the word "estate" as if he had said, whether chattels real or personal. If such was the construction in a case where the word "estate" was used *a fortiori*, it ought to be adopted in a case where only "property" is used. In *Cliffe* v. *Crabbons*, 2 *Ld. Ray.* 1. 325. the Lord Chancellor *Cowper* held, that where a man devises all his estate, goods and chattels, and no mention had been made before in the will of lands of which the testator was seised in fee, a fee simple will not pass; but where a real estate is mentioned before in the will, and then such words follow, a fee passes. In *Piggot* v. *Penrice*, *Prec. in Chan.* 471. where a man made his niece executrix of all his goods, lands and chattels, having no lands but in fee, it was holden that the lands did not pass. In *Timewell* v. *Perkins*, 2 *Atk.* 102. where the testator after a general introductory clause respecting his temporal estate, and a devise

of

1806.

ROE d. HELLING v. YEUD.

of particular freehold lands, gave all other the rest and residue and remainder of his estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, &c. or in any other thing whatsoever or wheresoever, it was determined that the general words "whatsoever and wheresoever" must be confined to things antecedent, and did not extend to real estate. It is said in *Wilkinson* v. *Mercam*, 1 *Rol. Abr.* 834. *pl.* 14. that if a man have lands in fee and leaseholds, and by will give to *J. S.* the leaseholds, and then to his executor all the residue of his estates, mortgages, goods, &c. that a fee will pass, the word "estates" being coupled with the word "goods." But in *Timewell* v. *Perkins* it is said, it appears to have been otherwise determined upon searching the record of the judgment. And according to the report of the same case in *Cro. Car.* 447. 449. it is expressly said to have been determined that a fee did not pass. In the same manner Lord *Hardwicke* in *Bailis* v. *Gale*, 2. *Ves.* 51. said, as to a residuary clause it had been held, that where estate was mentioned generally, accompanied with personal things, it should be restrained to personal, but never where real estate was mentioned, for then the personal things should be considered only as an enumeration of those specific things. The same seems to have been the opinion of the Court of K. B. in *Hilton* v. *Kenworthy*, 3 *East.* 553. and of Lord *Eldon* in *Woollam* v. *Kenworthy*, 9 *Ves. jun.* 137. who considered the question as a mere matter of intention. In this case the word "property" stands alone: no intention to pass real estate appears; and if the word "property" should be extended to real estate, other words which follow it must be considered as nugatory.

Best Serjt. for the Defendants. There is reason to believe that the testator intended to pass some real estate by his will; for in the first place the will is attested by three witnesses, and in the next place the testator has by

1826.

Roe d Hellings v.

express words charged his annuities, legacies, and debts upon the residuary devisees, which would have been quite unnecessary unless some real estate was intended to be given them, they being all made executors and executrixes upon whom the charge of paying debts and legacies out of the personal estate would naturally fall without any provision. With respect to the authorities referred to in 1 *Eq. Ca. Abr.* 211. the word "estate" is manifestly restrained by the words "chattels real and personal," which cannot extend to more than a term for years. In *Piggot* v. *Penrice* the word "lands" is restrained by "executrix," for the niece could only be executrix of leasehold lands. In *Timewell* v. [illegible] the word "estate" was restrained by the words "consisting of ready money," &c. which followed. In all these cases, therefore, the intention to give personal estate only was manifest. And in the cases of *Hilton* v. *Kenworthy*, and *Woollam* v. *Kenworthy*, the decision was founded upon the apparent intention to be collected from the whole will. The case of *Bridges* v. *Bridges*, *Vin. Abr.* tit. *Devise*, Q. b. *plac.* 13. is even stronger than this. There the testator, after giving several legacies, said, "I give the remainder of my estate, *viz.* my Bank stock, India stock, S. S. stock, and S. S. annuities, to my son *B. B*, and I do hereby make him sole executor of this my will," &c.; and Lord Chancellor *King* was of opinion, that the latter words under the *videlicet* did not restrain the general words "remainder of my estate," but were added by way of enumeration of the main particulars, more especially as the devisee was made sole executor. [Sir *James Mansfield* Ch. J. From the statement of that case I doubt whether the question related to real estate, or whether it was not confined to the residue of the personal estate. I apprehend that the question was, whether the devisee was entitled to any thing more than what was to be found under the *videlicet*? *Chambre* J. It would be very odd

if

1806.

Doe d. Helling v. Yeud.

if the real estate were not considered as one of the main particulars devised, supposing it to have passed under the general words, "remainder of my estate." In the present case the latter words are not to be considered as restraining the word "property," not being placed under a *videlicet*. If any word is to be inserted in the will, why may not the word "and" be inserted as well as *videlicet*? It is not true that where the word "estate" is coupled with words denoting personal property, no real estate shall pass; for in *Com. Dig.* tit. *Devise* N. 2. it is laid down that if a man devise several legacies, and afterwards such and such lands, and all the rest of his goods, monies, and other estate whatsoever to his executor, having other lands, those lands pass to the executor. Here the words are, "all the remainder of my property whatsoever and wheresoever," that is, of whatever quality and in whatever place. In *Doe* d. *Burkitt* v. *Chapman*, 1 *H. Bl.* 223. it was expressly determined, that the words "rest and residue of my estate of what nature or kind soever," though accompanied with limitations peculiarly applicable and usually applied to personal property only, included real as well as personal estate. It was decided in the case of *Huxtep* v. *Brooman*, 1 *Bro. Cha. Rep.* 437. that "all I am worth" passed real estate. And in *Hopewell* v. *Ackland*, *Com.* 164. that "all my goods, chattels, monies, debts, and whatsoever else I have in the world not before by me disposed of," extended to real estate. If the word "property" here is to be restrained by the articles afterwards enumerated, nothing will pass but what is contained in that enumeration: according to which rule, all the ready money of which the testator may have died possessed would be excluded. The words "property whatsoever and wheresoever" therefore must be carried beyond the articles enumerated; and if so, to what are they to be restrained?

Bayley,

1806.

ROE d. HELLING v. YEUD.

Bayley, Serjt. in reply, observed, that in *Trent* v. *Hanning*, 1 *New Rep.* 116. and 7 *East*, 97. five Judges out of eight considered the attestation of a will by three witnesses as insufficient to shew an intention to pass real estate; that if the word "property" was construed to include real estate, the latter words were unnecessary; but if only personal estate, then they were explanatory.

Sir JAMES MANSFIELD Ch. J. This case, like many others, arises upon the will of a man unacquainted with the law. If it were necessary to authorize a decision in favour of the heir at law to prove that it was not the intention of the testator to devise real estate, some doubt might be entertained on account of the generality of the words employed. But in cases between the heir and the devisee, the question is not whether the heir can prove that the testator did not intend to pass real property, but whether the devisee can prove that he did? The proof lies on the devisee. The common expression, that an heir shall never be disinherited, except by express-words, or such as have a necessary implication, is incorrect (*a*), and is well expressed by Lord Chief Justice *Willes*, in the case of *Moon* d. of *Fag* v. *Heaseman* (*b*), who, after shewing that the rule is inconsistent with a variety of cases, says, but the rule is that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited. And Lord *Hardwicke*, in *Timewell* v. *Perkins*, says, "Supposing it would admit of a doubt, yet certainly the heir at law ought to be preferred, unless the intention of the testator to exclude him appears exceeding plain." Where that intention does not clearly appear, the right of the heir must prevail, who is entitled by descent. The question here, therefore, is not whether there be not words in the will sufficient to raise doubts, but

(*a*) *Gardner* v. *Sheldon*, *Vaugh.* 262, 263. (*b*) *Willes*, 141.

1806.

ROE d. HELLING v. YEUD.

but whether it appears with clearness and certainty that the testator intended to devise his lands to the five residuary devisees? There is no introductory clause in this will indicating an intention of the testator to dispose of his whole property; nor is there one provision throughout the will which has the least relation to real estate. All the debts and legacies are to be paid by the executors and executrixes: there is no express charge of the debts on the real estate. Having made this incorrect residuary bequest, for what purpose did the testator make the enumeration at the end of his will, unless he intended to explain the meaning of the expression, "all the remainder of my property." Though I think that these general words would be sufficient to carry real estate if not explained, yet as the words stand I think it doubtful whether the testator so intended or not; and as the intention is not clear, the claim of the devisees must fall to the ground, and the title of the heir at law prevail.

ROOKE J. (*a*). It is unnecessary to add any thing to what has been observed upon the case by my Lord Chief Justice. I agree that the general words would be sufficient to carry a fee simple in the lands, if they stood alone. But as the testator has in no place given property to any one, his heirs and assigns, nor in any way shewn an intention to pass real estate, and the general words are followed by the restrictive enumeration with which the will concludes, I think it at least doubtful whether the real estate was intended to pass.

CHAMBRE J. It would have been as well if this case had stated the value of the personal property of the testator. If the personal estate had appeared to be so small as

(*a*) *Heath* J. was absent from indisposition.

1806.

Rose d Kellino v. Yeud.

hardly to be sufficient to pay the debts and legacies and leave any thing to the legatees, it might have raised some doubt. And it might also have been right to state the value of the real property, to enable the Court to judge whether it was likely that the testator should have overlooked it. Taking the case, however, upon the will only, the operation of the rule of law is in favour of the heir. If I were to guess, I should guess that the testator did not intend to disinherit him. There is an entire omission of real estate. It seems, therefore, as if the testator had nothing but personal property in view. As to the charge; the legatees are bound to pay debts and funeral expences in their character of executors. The bequest is coupled with the appointment of executors, and the testator extends the charge to the bequests by the will. This case is stronger in favour of the heir at law than *Marchant* v. *Twisden*. The words there were, "all my estate, chattels, real and personal;" and there might be some difficulty in saying that the words immediately following "estate," were merely explanatory of it. The term "estate" in common parlance applies to real property; and if the testator so understood it, it was necessary to add something more to make the personalty pass. But the Lord Chancellor, notwithstanding, gave his opinion in favour of the heir at law. In the present case the term made use of is more frequently applied to personal than to real estate. The particular enumeration at the end of the will, is incapable of being considered as any thing but an enumeration of what the testator supposed to be included in the bequest. It has been observed, that if this clause be strictly construed, it will exclude the five residuary legatees from taking any ready money. But that is not the use which I make of it. There is sufficient upon the face of the will to shew the intention that they should take all personal property, but the latter words

1806.

Ros d. Heath v. Yate.

words shew that it was personal property in general that was the object in view. It may be added, that it is not usual to devise real estate to be divided amongst so many as five persons: but this is a mere circumstance. Under these circumstances I cannot hesitate to agree in opinion with my Lord Chief Justice and my Brother *Rooke*, that judgment ought to be given for the Lessor of the Plaintiff.

Judgment for the Lessor of the Plaintiff.

Heath *v.* Rose.

June 18th.

If a Declaration be delivered indorsed "Delivered conditionally," a rule to plead given, and a demand of plea served, and judgment be signed for want of a plea, the Court will set it aside as irregular, there being no notice to plead.

THE declaration in this case having been delivered on the 6th of *May*, indorsed, "Delivered conditionally," and a rule to plead given, and a demand of plea served, and judgment afterwards signed for want of a plea, a rule was obtained calling on the plaintiff to shew cause why that judgment should not be set aside for want of a notice to plead.

Cockell Serjt. shewed cause, and contended, that no indorsement of a notice to plead was necessary. He cited *Hefferman* v. *Langelle*, 2 *Bos. & Pul.* 363. where an indorsement "to plead in —" was holden sufficient, though it did not give the Defendant any better notice of the time in which he was to plead than in the present case.

Marshall Serjt. *contrà*, cited the rule of *Easter* term 5 *Geo.* 2. (*a*), which requires notice to plead to be given where declarations are filed conditionally; he cited *Braty* v. *Baldock*, Barnes, 302., where judgment was set aside

(*a*) See Cyclit's Rules and Orders, C. B.

1806.

HEATH v. ROSE.

because the notice was to plead in four days, instead of eight; and contended, that in the case of *Hifferman* v. *Langelle* the necessity of a notice was recognized, though the particular indorsement there was deemed sufficient.

Sir JAMES MANSFIELD Ch. J. The case of *Hifferman* v. *Langelle* supposes a notice to be necessary, and the Court there thought that the indorsement amounted to a sufficient notice. The officers are of opinion that a notice to plead is necessary; and as no notice has been given in this case, the Defendant must prevail.

Per Curiam, Rule absolute.

June 18th.

NEWMAN *v.* ANDERTON.

A landlord may distrain for the rent of a lately furnished lodging.

REPLEVIN. The Plaintiff in his declaration complained that the Defendant took certain goods and chattels of the Plaintiff in a bed-room and shop, and unjustly detained them, against sureties and pledges. The Defendant avowed the taking in the bed-room, because "the Plaintiff, for the space of 16 weeks and more next before, and ending, &c. enjoyed the said bed-room in which, &c. together with a certain other room and apartment, also being in and part and parcel of the said dwelling house in the declaration mentioned, with certain furniture and effects with which the said bed-room in which, &c., and the said other room and apartment, with the appurtenants, were furnished, under a demise thereof theretofore made by the Defendant to the Plaintiff, at the weekly rent of 13*s.* of lawful money of *Great Britain*, payable weekly on the *Thursday* in every week, and during all that time held the same of the Defendant by virtue of the said demise, as his tenant thereof." And

because

because 12*l.* were in arrear, avowed the taking and prayed a return. 1802

NEWMAN v. ANDERTON.

The Plaintiff took judgment for so much as related to the shop; and as to the avowry, pleaded that he did not hold the said bed-room together with the said other room and apartment in the said declaration mentioned, and certain furniture and effects with which the said other room and apartment were furnished under a demise thereof theretofore made by the Defendant to the Plaintiff, at the weekly rent of 15*s.* payable on the *Thursday* in every week in manner and form, &c.

On this plea issue was joined.

At the trial before Sir *James Mansfield* Ch. J. at the *Westminster* Sittings after last *Hilary* term, a verdict was found for the Defendant.

A rule having been obtained calling upon the Defendant to shew cause why this verdict should not be set aside, upon the ground that the Defendant could not be entitled to distrain for the rent of ready furnished lodgings (*a*),

Vaughan Serjt. now shewed cause. The question is, whether a landlord be entitled to distrain for the rent of ready furnished lodgings? The remedy by distress is incident to every rent service. The object of a distress is to compel the performance of services, the omission of which formerly operated as a forfeiture of the feud. There seems to be no reason why the remedy by distress should be lost on account of the value of the property being enhanced by the addition of some chattels. Few tenements are let without some chattel, and it never has been contended hitherto that a landlord was deprived of

(*a*) As the objection in this case appeared upon the record, it should seem that the motion ought to have been for leave to enter judgment for the Plaintiff *non obstante veredicto*. See *Tidd's Pract.* 822.

1806.

Newman & Anderton.

his remedy because a looking-glass or some other chattel was agreed to be taken with the premises demised.

Best Serjt. contra. The power of distress applies only to rent for that which may be holden; namely, lands, tenements, and hereditaments; but it never was heard of that a person was entitled to that remedy upon the letting of personal chattels. Here the greatest part of the letting applies to chattels; for the furniture of lodgings is generally more valuable than the lodgings themselves. If, therefore, the demise include any thing but real property, the landlord must lose his distress. It is impossible to apportion the rent, and to determine how much is given for the land, and how much for the goods. The power of distress is a special remedy for the recovery, without action, of the rent of lands, tenements, and hereditaments. The landlord in this case still is entitled to his action, and therefore stands in as good a situation as all other persons who claim money under an agreement.

Sir James Mansfield Ch. J. Cases like this must have very often occurred, and yet it does not appear that the right of distress has ever before been called in question. The difficulty of the case consists in this, that in *London* and other towns it scarcely ever happens that any house is let without some goods being let with it, and yet one rent is always reserved. In the case of a brew-house it is common to let the utensils with it, and yet I never heard it doubted that the landlord might distrain for rent. Whether the goods be worth five shillings or five hundred pounds the case must be the same. We will inquire into the matter, and give our opinion in a few days.

Cur. adv. vult.

On this day Sir James Mansfield Ch. J. said—Upon this question no authorities have been cited either

on

1806.

NEWMAN v. ANDERTON.

on the one side or the other? That it must occur constantly that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods; for rent cannot issue out of goods. In *Spencer's case*, 5 *Co.* 17. it is resolved that if a man lease sheep or other stock of cattle, or any other personal goods, for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee; for it is but a personal contract; and it is added, "the same law, if a man demises a house and land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant, for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only." The material words in that resolution are those which declare that where land is leased with stock upon it, the rent still continues to issue out of the land only. In that case, therefore, as well as any other, the person to whom the rent is due may distrain for the same; and consequently the landlord here, who was not paid his rent, has pursued his legal remedy of distress, though the rent issued out of ready furnished lodgings.

Rule discharged.

1806.

June 29

THELLUSSON and Others v. SHEDDEN.

If an insured declare upon a total loss by capture, and after proving a capture shew a re-capture, upon which proceedings were had in an Admiralty Court, he cannot recover without proving the proceedings in the Admiralty Court under seal, though he only claim the amount of the loss sustained by the salvage, proceedings, and sale.

THIS was an action on a policy of assurance on goods on board the ship *Mary*, from *Jamaica* to *London*, and the declaration alleged a total loss by capture.

At the trial of this cause before Sir *James Mansfield* Ch. J. at the *Guildhall* Sittings after last *Hilary* term, it was proved that the *Mary* sailed from *Port Antonio* in *Jamaica* on the 1st of *May*, and was captured on the 12th of the same month; that she was re-captured on the next day (having had her papers and several of her men taken out), and arrived at *Port Royal* in *Jamaica* on the 16th of *May*; and that on her arrival there proceedings were instituted in the Admiralty Court, and the shippers of the cargo declining, under legal advice, to appear on behalf of the insured, a sale was ordered by the Court in order to defray the salvage and expences. The proceedings in the Court of Admiralty were not proved by the plaintiffs, but credit was given to the underwriters for the sum received out of Court by the agent of the assured in the island of *Jamaica*, and the difference only between that sum and the invoice price of the cargo was claimed. On the part of the Defendant (whose main defence to the action was a supposed fraud in the agents of the assured after the re-capture, and in the sale of the cargo,) it was objected, that the Plaintiffs could not recover without duly proving the proceedings in the Court of Admiralty. This objection was, however, over-ruled, and a verdict was found for the Plaintiffs, the jury negativing the fraud which constituted the defence.

The objection taken at the trial on the ground of the Admiralty proceedings not being duly proved having been reserved in *Easter* term, and a rule *Nisi* for a new trial obtained, *Shepherd* and *Bayley* Serjts. opposed that rule, and

and *Best* Serjt. was heard in support of it. The Court took time to consider of their opinion.

On this day the opinion of the Court was delivered by

Sir JAMES MANSFIELD Ch. J. The question is, whether in such a case as this, or in any case of capture and re-capture, the Plaintiff be bound to produce the proceedings in the Admiralty Court? It must strike every one that the necessity of producing them must often be attended with great inconvenience and expence. It certainly has not been the understanding, as far as I can learn from inquiry, that the production of such proceedings was ever to be required; and if it is to be laid down by this Court as a rule that the proceedings must be produced, no man of sense will ever bring an action in this Court of this sort, when he may recover his loss in the King's-Bench, without incurring so much expence and inconvenience. But in deciding this case we must proceed according to the rules and principles of law, which are applicable to all other cases as well as this. On the part of the Defendant the objection is, that the Plaintiff goes for a partial loss. The principal part of which consists in salvage, which depends on a proceeding in the Admiralty Court: and it is objected, that neither the salvage, which depends on the Admiralty Court, nor the expences of the Admiralty Court, can be otherwise proved than by producing the proceedings of that Court. The general rule certainly is, that nothing which depends on the proceedings of a Court can be proved by parol testimony; and it being the duty of the Plaintiffs in this case to make out a partial loss, I cannot see upon what principle the necessity of producing the proceedings can be dispensed with. The act of parliament 13 *Geo.* 3. *c.* 160. *s.* 40. expressly requires, in all cases of capture and re-capture, that some proceeding should be had in the Admiralty Court, to ascertain what the amount of salvage shall

1806.

TELLESSON and Others v. SHEDDEN.

shall be. The amount therefore, of the partial loss claimed of the underwriter must depend upon the proceedings of that Court. The answer of the Plaintiff is shortly this, that the capture being in the nature of a total loss, the claim of a partial loss comes in by way of defence; but I do not think that is the correct way of stating the case. It is true that a capture simply proved establishes a total loss; but when the Plaintiff in the same breath proves a re-capture, there is an end of the capture and total loss, and the Plaintiff is entitled to a partial loss only; which he must make out by evidence in the same manner as all other Plaintiffs. It seems to us, therefore, that the Defendant in this case had a right to insist upon the production of the proceedings. It has been argued, and perhaps truly, that where a ship could not be carried into an Admiralty Court, the impossibility would excuse the production of the proceedings which would be required by ordinary rules. In this case, however, there is nothing to prevent the general rule from taking place, that where the Plaintiff seeks to recover in consequence of a judgment of a Court, he must produce the judgment. Here the Plaintiff's claim depends upon the judgment of a Court of Admiralty, which has fixed the salvage and expences; consequently the Plaintiff must produce the proceedings in a regular way.

Per Curiam, Rule absolute.

1806.

June 23d.

Thomas v. Portall and two Others.

If one of three Defendants in a joint action appear to a *quare clausum fregit*, and the two others, being arrested on bailable process, have till the ensuing term to justify bail, and the Plaintiff, previous to that time, delivered a declaration against all three, indorsed "conditionally until special bail is perfected this is irregular *Quer* Whether, if the declaration had been indorsed conditionally, until bail shall be perfected by the two latter Defendants, it would have been irregular?

THIS was an action against three Defendants, two of whom being arrested upon a writ returnable in five weeks of *Easter*, put in bail in due time, which were excepted to on the 16th of *May*; and *Easter* term ending on the 19th of *May*, the bail had to the first day of *Trinity* term to justify. A *quare clausum fregit* returnable on the morrow of the *Ascension* was sued out against *Portall*, the third Defendant, to which he appeared on the 20th of *May*. On the 31st of *May* a declaration against all three Defendants was delivered, indorsed as follows; "This declaration is delivered conditionally until special bail is perfected, and the Defendants are to plead hereto within the first four days of next *Trinity* term, otherwise judgment." Bail justified on the first day of *Trinity* term, and no plea having been put in within the time, judgment was signed.

To set aside this judgment for irregularity a rule *Nisi* was obtained on a former day, on the ground of the declaration having been delivered conditionally after one of the Defendants had appeared.

Bayley Serjt. shewed cause, and contended that the declaration was regularly delivered; that the Plaintiff was not at liberty to declare in chief against one Defendant until all had appeared. Unless, therefore, the Plaintiff was entitled to deliver his declaration conditionally, he could not declare at all, until all the Defendants had appeared, which would occasion great delay. But that if the Plaintiff was at liberty to declare in chief against the one who had appeared, this declaration might be considered as delivered in chief against *Portall*, and conditionally

1806.

TURNER v. PORTAIL and two Others.

tionally against the two others, till they should perfect their bail *reddendo singula singulis.*

Shepherd Serjt. *contrà*, insisted that the declaration was irregularly delivered; that it could not be delivered conditionally against *Portall* after his appearance, for that he had nothing to perform; and it is a general rule, that a declaration cannot be delivered conditionally against any person after the time for his appearance has expired, *Fotherby* v. *Lloyd*, *Barn.* 342. *Smith* v. *Paynter*, 2 *T. R.* 719. *Baker* v. *Cooper*, 6 *T. R.* 548. That the Plaintiff, by suing out different process against different Defendants in a joint action, had deprived himself of the benefit of declaring conditionally, and that there was no ground for considering the declaration as delivered in chief against one and conditionally against the other two, there being no distinction pointed out in the indorsement.

The Court was of opinion, that the declaration was irregularly delivered; that the right to deliver a declaration conditionally was a privilege to be exercised before the parties were in Court; that no precedent had been produced of the delivery of a declaration in a joint action where one had appeared and the others were not brought into Court, and that if a declaration could be delivered conditionally with respect to two only, it ought to be indorsed delivered conditionally until bail shall be perfected by *A.* and *B.*

Per Curiam, Rule absolute.

1806.

(IN THE EXCHEQUER CHAMBER.)

SMITH and Another *v.* WOODHOUSE. In Error. *June 24th.*

ERROR from a judgment of the Court of King's Bench. The declaration contained several counts, of which the third stated that by a certain agreement between the Defendants and the Plaintiff below in respect to and concerning certain claims of the Plaintiff upon the estate of *James Woodhouse*, deceased, and the Defendants, as trustees of such estate. It was agreed that the Defendants should pay to the Plaintiff, within two months from the date thereof, 1500*l.* with interest, and that in consideration thereof the Plaintiff should deliver up all securities in his possession or under which he claimed any debt against the estate of the said *James Woodhouse*, deceased, or any person or persons as sureties for him, and at the same time should execute a general release of all claims and demands on the estate of the said *James Woodhouse*, deceased, and all and every person or persons bound for him as surety or sureties for money lent or interest thereon, for business done or money disbursed, or for any other dealings, matters, or things, which subsisted between the Plaintiff and the said *James Woodhouse*, deceased, during the life of the latter and up to the day of his decease, and between the Plaintiff and the personal representatives and trustees of the estate of the said *James Woodhouse*,

Defendant agreed to pay to Plaintiff, within two months 1500*l.* and in consideration thereof Plaintiff agreed to deliver up all securities in his possession under which he claimed any debt against the estate of *J. W.* deceased, to execute a general release of all claims on the estate of *J. W.* for matters between Plaintiff and *J. W.* to the day of his decease, and between the trustees and representative of *J. W.* to the date of the agreement, except 600*l.* and interest due on a bond given by *J. W.* which Defendant agreed to pay to the person entitled thereto. In *assumpsit*, stating mutual promises to perform the agreement, Plaintiff averred that he was ready and willing to deliver up all securities under which he claimed any debt against the estate of *J. W.* deceased, and to execute a general release of all claims on the estate of *J. W.* for matters between the Plaintiff and *J. W.* deceased, to the day of his decease, and assigned for breach non-payment of the 1500*l.* and 600*l.* or either of them. Held that the release described in the declaration was not so extensive with that agreed to be given, and that this defect would not be cured by a verdict. But that in this case it appeared that the payment of the money was intended to precede the release, and therefore the averment was not necessary, and the declaration well enough.

Woodhouse,

1806.

SMITH and Another v. WOODHOUSE. In Error.

Woodhouse, deceased, up to the date thereof, save and except a sum of 600*l.* or thereabouts, with some arrear of interest due thereon on a bond originally given by the said *James Woodhouse*, deceased, and *John Woodhouse* his brother, dated, &c. and by him admitted to be the property of *Philip Lewis* of *Tupsley*, since deceased, and delivered over to him, and the whole of which sum, and the interest remaining due on the said bond, was thereby agreed to be paid by the Defendants, as such trustees, as aforesaid, to the persons entitled thereto over and above the said sum of 1500*l.* agreed to be paid to the Plaintiff. That in consideration that the Plaintiff had promised to perform his part of the agreement, the Defendants promised to perform theirs; that the Plaintiff had always been ready and willing to deliver up all securities in his possession, or under which he claimed any debt against the estate of the said *James Woodhouse*, deceased, or any person or persons as securities for him, and also to execute a general release of all claims and demands on the estate of the said *James Woodhouse*, deceased, and all and every person and persons bound for him as surety or sureties for money lent and interest thereon, for business done and money disbursed, and for all other dealings, matters, or things, which subsisted between the Plaintiff and *James Woodhouse*, deceased, during his life and up to the day of his death, according to the form of the agreement; that the Defendants were requested by the Plaintiff as well to pay him the sum of 1500*l.*, as also the said sum of 600*l.* due on the said bond mentioned in the agreement, and interest, to the persons entitled thereto, according to the form of the agreement; yet that the Defendants did not within two months from the date of the agreement pay either the sum of 1500*l.* or 600*l.* or interest to the persons entitled thereto, but wholly refused so to do.

Plea, *Non assumpsit*.

A verdict

1806.

SMITH and Another v. WOODHOUSE. In Error.

A verdict having been found for the Plaintiff, and judgment entered up for 2021*l.* 10*s.* the Defendants brought a writ of error, and assigned for error that the declaration did not allege that the Plaintiff had executed or was ready or willing to execute a general release of all claims and demands for money lent or interest thereon, for business done or money disbursed, or for other dealings, matters, or things which subsisted between the Plaintiff and the personal representative and trustees of the estate of the said *James Woodhouse*, deceased, up to the date of the agreement, in the declaration mentioned; save and except as therein is expressed.

Joinder in Error.

Harryatt, for the Plaintiffs in error. There are two objections to the declaration. First, it is not averred that the Plaintiff below offered to deliver up the securities in his possession, and to execute a general release. Secondly, The Plaintiff, in an action of *assumpsit*, has demanded damages for non-payment of a sum of money secured by bond. First, Where two parties by agreement bind themselves to do concurrent acts, he who demands damages of the other for not performing his part of the contract, must aver that he has offered to perform his own. The question, therefore, is, Whether the acts specified in the agreement are to be considered as concurrent acts, or whether the payment of the money is to precede the giving a release? If one agree to pay for a horse, and the other to deliver it, these are concurrent acts, for the two things are to be done at the same time; and he who brings the action must shew an offer to do his part. It may be said, that as a certain time is limited for paying the money, and none for giving the release, the former act is to precede the latter. But in the case of *Morton v. Lamb*, 7 *T. R.* 125. where corn had been sold at a fixed price, which the Defendant had agreed to deliver within a

1806.

SMITH and Another v. WOODHOUSE. In Error.

certain time, the Court arrested the judgment after verdict for want of an averment that the Plaintiff had tendered the price. And in *Glazebrook* v. *Woodrow*, 8 *T. R.* 366. a declaration in covenant for not paying the price of certain premises agreed to be conveyed to the Defendant on or before a certain day, on or before which same day the price was to be paid; was holden bad for want of averring a tender of a conveyance. The manifest spirit and intention of the agreement declared on in the present case is, that the money shall be paid and the release given at the same time; and if so, the acts are concurrent. It never could have been intended that the securities should be retained for a moment after the money was paid. It was clearly the meaning of the parties that when the money was paid the securities should be delivered up; and as the agreement expressly provides that the release shall be executed "at the same time," that the securities were to be delivered up, it is evident that all the acts were intended to be done together. In the present case the Plaintiff has not only omitted to plead an offer to give a release according to the agreement, but he has not even averred that he was ready and willing to do so, for the release which he avers that he was ready and willing to give is not equally extensive with that mentioned in the agreement; for it does not comprise matters between the Plaintiff and the personal representatives and trustees of the estate of *James Woodhouse*, deceased, and is confined to the day of the death of *James Woodhouse*, instead of extending to the date of the agreement. Nor can the want of an averment that a proper lease was offered be cured by verdict, for a verdict will not aid a defective title, though it will aid a title defectively set forth. Secondly, The sum of 600*l.* being secured by bond, cannot become the subject of an action of *assumpsit* upon a parol agreement; and as the Plaintiff has taken a general verdict upon the whole declaration, it cannot be ascertained

ascertained to what part the damages apply; and consequently the judgment is bad.

1806.

SMITH and Another v. WOODHOUSE. In Error.

Abbott, for the Defendant in error. First, The rule which excludes bond debts from being recovered by actions of *assumpsit* does not apply to the present case where the person making the promise could never have been sued on the bond. Here the bond was not given by the Defendants, but by *James Woodhouse*, deceased, and *John Woodhouse*, his brother; the promise, therefore, by the Defendants to pay this debt being sustained by a good consideration, is valid in law, and may be sued for in this form of action. Indeed, if it were not, the judgment might still be supported, there being sufficient matter in the third count to warrant the verdict, independent of the 600*l.*; and where sufficient matters are alleged in any one count to maintain the action, and other matters are added, which are not sufficient for that purpose, it shall be presumed that the Judge directed the jury to confine the damages to those parts which are good. Thus, if a count contain some words which are actionable, and others, which are not, judgment cannot be arrested; but if there be one count upon words which are actionable, and another count upon words none of which are actionable, and a general verdict, judgment shall be arrested; for it must be presumed that some damages were given upon every count, though not upon every part of each count. Secondly, the objection specially assigned as error is not founded in fact; for the Plaintiff below could have no claim upon the personal representatives and trustees of the estate of *James Woodhouse*, deceased, but such as were claims on the estate of the said *James Woodhouse*. And as the declaration avers that the Plaintiff was willing to execute a release of all claims upon the estate of *James Woodhouse*, deceased, it

1806.

SMITH and Another v. WOODHOUSE. In Error.

cannot be said that he has not averred his readiness to execute a release co-extensive with the agreement. In this form of action, however, it is not necessary to aver that the Plaintiff was either ready or offered to execute a release. The declaration states, that in consideration that the Plaintiff had promised to perform his part of the agreement, the Defendant promised to perform his; the Plaintiff's promise, therefore, and not his performance of the agreement, is the consideration of the Defendant's, and it must be taken after verdict that the Plaintiff's promise was proved. This was so determined in *Martindale* v. *Fisher*, 1 *Wils.* 88. Supposing, however, that the action in this case had been grounded on a covenant under seal, it would not have been necessary to aver an offer to execute a release. The release is not the consideration for paying the money, in which respect the case differs very materially from those of sale and purchase. There is a time limited for paying the 1500*l.*, after which the Plaintiff was at liberty to bring his action, but he is not bound to give the release until the money secured by bond has also been paid, for which no time is limited. Moreover, the Plaintiff is not bound to execute the release at his own expence; it must be prepared by the Defendants; and till prepared he cannot be called upon to execute it. The acts, therefore, of paying the money and giving the release are not concurrent. Nor is the release the consideration for paying the money; it is evident from the agreement that the money was to be paid as an adjustment of demands, and not in consideration of a release to be given; and it is only where the act agreed to be done goes to the whole consideration that it is necessary to aver performance. *Duke of St. Albans* v. *Shore*, 1 *H. Bl.* 270.

Cur. adv. vult.

On

1806.

SMITH and Another v. WOODHOUSE. In Error.

On this day the opinion of the Court was delivered by Sir J. MANSFIELD Ch. J. That part of the agreement which regards the release to be given by the Plaintiff (below) requires it to be a release of all demands upon the trustees of the estate of the deceased up to the date of the agreement. But there is no averment in the declaration of any offer of a release to the Defendants (below) in their character of trustees, nor beyond the time of the death of *J. Woodhouse*; therefore, as the release which the Plaintiff was willing to give does not appear to be such as was stipulated for, the averment must be considered insufficient, if any averment of the sort be necessary. It is not necessary for us to decide by whom the release ought to be prepared. The question here is, Whether the Plaintiff be bound to make any averment that he has offered to give a release to entitle him to bring this action? We think that no such averment is necessary, and that the payment of the money is the first act to be done. Had it been necessary to aver an offer to execute a release, it seems from the authorities to be now decided, that the defect could not have been cured by verdict. Lord *Mansfield*, indeed, in the case of *Collins* v. *Gibbs*, 2 *Burr.* 900., upon a motion in arrest of judgment, after judgment by default, where the objection was, that the Plaintiff had not averred a tender of a release, says, "the Plaintiff has not averred performance of what was to be done on his part, nor shewn that he was ready to perform it; therefore we are all of opinion that it cannot be made good as laid in the declaration, and the true distinction as to supplying such defects is, whether the objection be made after a verdict or not?" implying that a verdict would have made it good, upon this principle, that where an act is to be done by the Plaintiff, it must be intended after verdict that all was done which ought previously to have been done. This distinction, however, seems now to be at

1806.

SMITH and Another v. WOODHOUSE. In Error.

an end; for had it existed, the case of *Morton* v. *Lamb* must have been otherwise determined. In the present case the agreement is that the Defendants shall, within two months, pay 1500*l.*, and that in consideration thereof the Plaintiff shall deliver up all securities, and at the same time execute a general release. Now it could not be expected that the Plaintiff should be ready with a release at all times; but the agreement on the part of the Defendants would be satisfied by a tender or payment of 1500*l.* at any time within two months. The payment of the money, therefore, appears by the nature of the agreement itself to be the first thing to be done; and on this ground we are of opinion that the judgment must be affirmed. Some of the cases turn on niceties almost contrary to common sense, and not very creditable to the law as a science. But the true rule is, that it is not the employment of any particular word, which determines a condition to be precedent, but the manifest intention of the parties, and in this case, from the agreement itself, it appears to us that the first act to be done was the payment of the money.

Judgment affirmed.

June 25th.

The Court will discharge a Defendant out of custody in execution after the Plaintiff's death, if it appear that the next of kin do not intend to take out administration, on service of the rule *Nisi* on the next of kin.

PARKINSON *v.* HORLOCK.

LENS Serjt. on a former day obtained a rule to shew cause why the Defendant, who had been in custody in execution at the Plaintiff's suit for 5000*l.* ever since the year 1792, should not be discharged; the Plaintiff, who lived in the *Strand*, having died in *November* last in embarrassed circumstances, and his nearest relations having expressed their intention to refrain from taking out administration. He cited *Broughton* v. *Martin*, 1 *B. & P.* 176.

The

1806.

PARKINSON v. HOBLOCK.

The Court desired that the rule might not be made absolute without the matter being mentioned.

And on this day, *Lens* having produced an affidavit, stating that the rule had been served on six persons who were next of kin to the Plaintiff, and no cause having been shewn,

The Court made the

Rule absolute.

HAMAR *v.* ALEXANDER.

June 25th.

THIS was an action on the case. The declaration stated "that the Defendant falsely, fraudulently, and deceitfully represented, asserted, and affirmed to the Plaintiff, that one *Christopher Leo* was a good man, and might be trusted to any amount, and that he the said Defendant durst be bound to pay for him the said *Christopher Leo*." It then alleged that in consequence of this false representation the Plaintiff sold goods upon credit to *Leo*, and it negatived the truth of the Defendant's representation of him, averring him to have been in bad circumstances at the time, "as the Defendant well knew."

At the trial of this cause, at the last *Chester* assizes, the representation was proved as laid in the declaration, and that the Defendant added, if *Leo* did not pay for the goods, he would; it was also proved, that the Defendant made that representation knowing *Leo* to be in bad circumstances, and with a view to obtain credit for him, in order that the goods sold to *Leo* might be consigned to a house with which he the Defendant was connected; and that a person of the name of *Crompton* acted as the broker, and also knew the representation made by the

If *A.* fraudulently represent the circumstances of *B.* to be good, in order to induce *C.* to give him credit, and add "if he does not pay for the goods I will," an action may be maintained against *A.* for the misrepresentation, notwithstanding the addition of the pro-

1806.

HAMAR v. ALEXANDER.

Defendant to be false. On the part of the Defendant it was objected, that the representation having been accompanied by a promise to pay, which, not being in writing, was void under the 4th section of the statute of frauds (*a*), this action could not be sustained for the deceit, because the injury might have arisen from the void promise, and not from the false representation. *Dallas* Ch. J. and *Burton* J. before whom the cause was tried, were both of opinion the action was well maintained on the ground of deceit, and the Plaintiff obtained a verdict.

In *Easter* term last a rule *Nisi* was obtained, on the same objection, for setting aside the verdict and entering a nonsuit.

Shepherd Serjt. now shewed cause. There can be no doubt, since the case of *Pasley* v. *Freeman*, 3 *T. R.* 51, has been fully recognised as law, that this Plaintiff is entitled to retain his verdict, unless his right of action founded on the false representation be done away by the void promise with which that representation was accompanied. The promise to pay was only one ingredient in the conversation, and cannot operate to do away the right of action arising out of the remainder of the conversation. The Plaintiff does not attempt to charge the Defendant on his contract, but on his fraud. Indeed, the words which are said to import a promise were not strictly in the nature of a promise, but only a mode of speaking adopted by the Defendant in order to give force to his representation, and induce the Plaintiff to believe it. If such an additional ingredient in a false representation could secure the party using it from any legal liability, every man who wished to deceive another into an unmerited credit, might always assist his fraud by such

(*a*) 29 *Car.* 2. *c.* 3.

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an addition, and yet secure himself from the consequences of his fraud by the very means by which he made it successful. If goods be sold, and the vendor practise any fraud with the goods, the vendee might maintain an action on the contract, and also an action against the vendor for the deceit practised. So here, if the promise in question might have been sued upon before the passing of the statute of frauds, why should the Defendant be prevented from pursuing his remedy for the deceit, because the statute has taken away his remedy on the contract?

Williams Serjt. in support of the rule. This is an attempt to convert an action of contract into an action of tort, and thereby render useless the 4th section of the statute of frauds. In the conversation which took place between these parties, it is evident the latter words used by the Defendant included all the former part of the representation; for of course the Defendant would not promise to pay for *Leo* unless he deemed him a solvent man. *Pasley* v. *Freeman* is new law, and Lord *Eldon*, when presiding in this court, said he never would carry the law beyond that case. Indeed it is very remarkable, that in *Pasley* v. *Freeman*, 3 *T. R. p.* 54. Mr. Justice *Grose* points at this very case; for he observes, if the action were supported the Plaintiffs would be "in a better situation than they would have been if in the conversation that passed between them and the Defendant, instead of asserting that *Tralch* might be safely trusted, the Defendant had said 'if he do not pay for the goods I will;' for then an action would not have lain against the Defendant." With respect to the action of deceit for fraud practised with goods, it must be remembered, that it is a common law right of action not restrained by any statute, and that the whole transaction which is the subject of it passes be-

1806.

HAMAR v. ALEXANDER.

tween the principals, and not between them and some third person who comes in only collaterally.

Cur. adv. vult.

On this day the opinion of the Court was delivered by Sir JAMES MANSFIELD Ch. J. This is an action against the Defendant for misrepresenting the circumstances of one *Christopher Leo*, by which the Plaintiff was induced to give him credit. The objection to the verdict is rather curious, namely, that after the Defendant had represented the circumstances of *Leo* in strong terms, he concluded by telling the Plaintiff that if *Leo* did not pay him he would. This promise certainly could never have been sued upon since the statute of frauds. And that circumstance is made the foundation of a plausible objection to the recovery in this case. It is impossible to say how much mischief may have been done by the misrepresentation, and how much by the promise; but upon the whole I think that the verdict ought to stand. Independent of the promise, I think this is clearly a case upon which an action might be maintained if the case of *Pasley* v. *Freeman* had never been heard of. Here a gross cheat was meditated, and I am by no means certain that the parties might not have been indicted for a conspiracy. Each meant to serve the other in the fraud meditated. The design was to cheat the Plaintiff, by getting goods into the possession of *Leo*. I think, therefore, on the circumstances of the case, exclusive of any authority, that this is an action which may be maintained. I am far from wishing to sustain an action simply upon misrepresentation, but there never was a time in the *English* law where an action might not have been maintained against the Defendant for this gross fraud. The only question then is, Whether the addition of this promise, that if *Leo* did not pay the Defendant would, will prevent the Plaintiff from having a right to support

support this action? I think that it will not. There is no proof that the Plaintiff ever considered the Defendant as his debtor, or ever called upon him for the money, or relied upon his promise in the least degree. In the next place, we must suppose every man to know the law; and if the Plaintiff was acquainted with the law he must have known that the Defendant's promise was worth nothing, and could have given no credit to him upon it. He cannot have considered it in any other light than as a mode of expression by which the Defendant intended more strongly to express his opinion of *Leo*'s circumstances. There being, therefore, no objection on the ground of this promise being added to the other words, we are of opinion that the verdict is right.

Per Curiam, Postea to the Plaintiff.

WALSH *v.* DAVIES.

June 25th.

The Court of Common Pleas will not grant a *habeas corpus* to bring up a prisoner in custody upon a criminal matter in order to have him charged with a declaration in a civil action.

BAYLEY Serjt. moved for a *habeas corpus* to bring up the Defendant, a prisoner in *Cold Bath Fields* prison for a conspiracy, in order to charge him with a declaration upon an affidavit of debt for 4865*l.* 7*s.* 4*d.* The application had been made to Mr. Justice *Chambre*, who had declined to grant the *habeas corpus*, but desired the matter might be mentioned to the Court.

Bayley observed, that if the Defendant had been in the custody of the sheriff it would have been a matter of course, and that the only object in the present case was that, if the Defendant should be discharged from the criminal process, he might remain in the custody of the sheriff, charged with a civil action. That it was competent to the Court to grant a *habeas corpus* to any person who had the custody of any of the king's subjects

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1806.

WELCH v. DAVIES.

to ascertain the cause of his detention; and that the Defendant under such writ might be brought up in the custody of the keeper of the House of Correction, and charged with the declaration, without any change of custody. He referred to *Ramsay* v. *Macdonald*, *Foster's Cro. Law*, 61. 1 *Black.* 30. where it appeared that *Æneas Macdonald*, while under sentence of death for high treason, was charged in custody of the sheriff at the chambers of the Lord Chief Justice in a civil action; and *Coffin* v. *Gunner*, 2 *Str.* 873. 2 *Ld. Ray.* 1572. to the same effect.

CHAMBRE J. This cannot be done without changing the custody of the Defendant; for the party to be charged must either be in custody of the sheriff or of the officer of this court. In the case of *Peter Vergen's* bail, 2 *Str.* 1217. the Court of King's Bench directed a prisoner convicted of felony to be brought up, that the bail might surrender him to the marshal, after which the Court remanded him to *Newgate*; and in *Fowler* v. *Dunn*, 4 *Burr.* 2034. the Court of King's Bench made a similar order; but the Master reported that the *habeas corpus* must be on the Crown side. Upon the same principle, in the case of *John Taylor*, 3 *East*, 232. where a prisoner in the custody of the keeper of *Newgate*, under a warrant of commissioners of bankrupt, was brought up by *habeas corpus*, the Court determined that being in custody on criminal process the *habeas corpus* ought to be on the Crown side. If that be so, this Court cannot charge the Defendant in a civil action; for if upon the return of the *habeas corpus* we should find the custody to be lawful, we must send the Defendant back again. This Court cannot change the custody and then commit the Defendant again upon the criminal matter.

The other Judges concurring,

Bayley took nothing by his motion.

1806.

DORANT *v.* ROUVELLET, *alias* ROMNEY.

June 25th.

Costs for not proceeding to trial and judgment as in case of a nonsuit, may both be moved for in the same term.

THE only question in this case was, Whether the Plaintiff, after moving for costs for not proceeding to trial, could move for judgment as in case of a nonsuit in the same term.

The Court, on reference to the officers, held that the motion might be entertained.

Vaughan Serjt. for the Plaintiff.

Best Serjt. for the Defendant.

WOOD *v.* TATE.

June 19th.

By indenture between *A.*, *B.*, and *C.*, bailiffs, and *D.*, *E.*, and *F.*, aldermen, with the assent of the burgesses of the borough of *M* of the one part, and *J. S* of the other part the said bailiffs, aldermen, and burgesses demised lands to *J. S.* for years, to be holden of the said bailiffs, aldermen, and burgesses and the deed was executed by *A.*, *B.*, and *C.*, *D.*, *E.*, and *F.*, but not sealed with the corporation seal; *J. S.* having paid rent to the bailiffs as chief officers of the borough, held that their servant might make cognizance for taking a distress under a demise by the corporation, notwithstanding a notice had been given by the aldermen (one of whom was a party to the indenture) to pay the rent to them; for the payment of rent to the bailiffs admitted a tenancy from year to year under the corporation.

REPLEVIN. The Defendant made cognizance first as bailiff of the bailiffs and burgesses of the borough of *Morpeth*, in the county of *Northumberland*, acknowledging the taking the Plaintiff's goods and chattels as a distress for 3*l.* 5*s.* for half a year's rent ending on the 2[illegible] *May*, 1803, due from the Plaintiff to *the said bailiffs and burgesses* for the messuage or tenement and yard or parcel of land adjoining thereto in which, &c. with the appurtenances held and enjoyed by the Plaintiff as tenant thereof,

1806.

WOOD v. TATE.

thereof, to the said bailiffs and burgesses, by virtue of a certain demise thereof to him the said Plaintiff, theretofore made at and under the yearly rent of 6*l.* 10*s.* payable half-yearly, to wit, *Whitsuntide* and *Martinmas* in every year, by even and equal portions. To this cognizance the Plaintiff pleaded in bar, 1st, That he did not enjoy the said messuage or tenement and yard or parcel of land in which, &c. with the appurtenances, as tenant thereof to the said bailiffs and burgesses of the borough of *Morpeth* aforesaid in manner and form as the said Defendant had in his said cognizance alleged. 2dly, *Riens en arrere.* 3dly, That the said Defendant was not bailiff to the said bailiffs and burgesses of the borough of *Morpeth*, and did not take the said goods and chattels in the declaration mentioned as bailiff of the said bailiffs and burgesses of the borough of *Morpeth* aforesaid in manner and form as the said Defendant in his cognizance aforesaid had alleged.

On each of these pleas in bar an issue was joined. There were other cognizances and pleas, and issues joined thereon.

This cause came on to be tried before Mr. Justice *Chambre* at the last assizes for the county of *Northumberland*, when a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case.

The burgesses of the borough of *Morpeth*, in the county of *Northumberland*, are a corporation by prescription, by the name, style, and title of The Bailiffs and Burgesses of the Borough of *Morpeth*, in the County of *Northumberland*, consisting of two bailiffs and other officers, and an indefinite number of burgesses or freemen. The bailiffs and certain other officers of the corporation are elected and sworn into their respective offices annually, *viz.* at the court leet and court baron held on the first *Monday* next after *Michaelmas day*. The bailiffs are the chief

1806.

WOOD v. TATE.

chief officers of the borough; they call all corporate meetings or guilds, and preside at the same; they alone collect and receive the rents and revenues of the corporation. There are within the said borough seven companies or fraternities, consisting of an indefinite number of burgesses and free brothers. The free brothers are not burgesses, or freemen of the borough, but are merely members of their respective companies, and it is from them the borough is supplied with burgesses or freemen; but when elected and admitted burgesses or freemen, they still continue members of their respective companies. Each of these seven companies is governed by its own alderman, who is elected and sworn into office at the head-meeting day of his company, held every year at a different time from and unconnected with the court-leet and court-baron, where the bailiffs and other officers of the borough are elected and sworn into office. The burgesses or freemen of the borough are elected by the several companies or fraternities from the free brothers of each company in certain proportions, *viz.* The merchants' and tailors' company elect 4. The tanners 6. The fullers and dyers 3. The smiths, sadlers, and armourers 3. The cordwainers 3. The weavers 3. And the skinners and butchers 2.—In all 24. The alderman presides at the meeting of his company when such election is made, and certifies the names of the persons so elected by the company to the steward of the court at one of the two courts-leet held for the said borough in every year, *viz.* on the first *Monday* after the clause of *Easter* and the first *Monday* after *Michaelmas-day*; and the persons so certified by the respective aldermen to have been elected are there sworn and admitted burgesses or freemen of the borough. The grant of the 12th *March*, in the 6th year of the reign of King *Edward* the 6th, of certain lands in *Northumberland* for the maintenance and support of a master and usher of a free grammar school at *Morpeth*, is to

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1806.

WOOD v. TATE.

the bailiffs and burgesses of the borough of Morpeth. The charter of confirmation of all the ancient usages, customs and privileges of the borough of *Morpeth*, dated 30th *December*, 15th *Charles* II. is to the *bailiffs and burgesses of the said borough*. The bailiffs and burgesses, at the time of making of the indenture hereafter mentioned, were seised in fee of the tenements therein mentioned, and such indenture was made as hereafter mentioned, (that is to say)

By indenture, bearing date the 15th of *September* 1794, and made between *Edward Challoner* and *Thomas Clennell, bailiffs of the borough and corporation of* Morpeth *in the county of* Northumberland, *and* John King, Thomas Bowman, William Scott, James Thompson, Ralph Bowman, *and* Robert White, *aldermen of the said borough and corporation of* Morpeth, with the assent and consent of all the free burgesses of *Morpeth* aforesaid of the one part, and *William Wood*, of *Buller's Green*, in the parish of *Morpeth* aforesaid, weaver, of the other part, It was witnessed, That the said bailiffs, aldermen, and burgesses, for and in consideration of the yearly rent and covenants therein contained, did demise, &c. unto the said *William Wood*, his executors, administrators, and assigns, certain premises therein mentioned and described, (being the premises in question), with the appurtenances, for the term of 21 years from *Martinmas* then next ensuing the date thereof, yielding and paying therefore yearly and every year, during the said term of 21 years, *unto the said bailiffs, aldermen, and burgesses, and their successors*, the yearly rent of 6*l.* 10*s.* of good and lawful money of *Great Britain*, payable at *Whitsuntide* and *Martinmas*, by even and equal payments. And in case the said yearly rent of 6*l.* 10*s.* should be behind and unpaid for the space of 40 days next after the said days of payment, the same being legally demanded, that then and from thenceforth it should and might be lawful for the said

bailiffs,

bailiffs, aldermen, and burgesses, and their successors, into the said demised premises to enter and distrain, &c. &c. There was a clause of re-entry, and several other covenants, all made with the said *bailiffs, aldermen, and burgesses*. The indenture then proceeded thus, "And the said bailiffs, aldermen, and burgesses, for themselves and their successors, did thereby covenant and agree, to and with the said *William Wood*, his executors, administrators, and assigns, that in consideration of the performing all and singular the covenants and agreements to be paid, done, kept, and performed on their part, it should be lawful to and for the said *William Wood*, his executors, administrators, and assigns, to have, hold, occupy, possess, and enjoy all and singular the thereby demised premises, without the lawful let, suit, trouble, or molestation of them, or any of them, or any of their successors, during the term thereby granted." And the said indenture concludes thus: "In witness whereof we have hereunto set our hands and seals, the day and date first above written." The said indenture was signed and sealed by the said bailiffs and five of the said six aldermen, with their christian and sirnames, and their private seals annexed, but the common seal of the borough was not affixed thereto; it was duly executed by the said plaintiff, being the said lessee, by his signing, sealing, and delivering the same. The Plaintiff being the said lessee, upon the making and executing of the said indenture, entered into the said demised premises, with the appurtenances, and was possessed of and enjoyed the same until the time of making the above mentioned distress. The sum of three pounds and five shillings, for half a year of the said rent of the said demised premises, with the appurtenances, at *Whitsuntide* one thousand eight hundred and three, became due and payable from the Plaintiff under and by virtue of the same indenture; and until and at the time of making the said distress, was and still is in arrear and unpaid.

The

1806.

WOOD v. TATE.

The rent that had before accrued due was always paid by the Plaintiff *to the bailiffs of the said borough for the time being*. On the third day of *September* one thousand eight hundred aud three, notice in writing was signed by *James Bowman*, *Thomas Clennell*, *John Daglish*, *Robert Creighton*, *John Singleton*, *Nicholas Henderson*, and *Francis Singleton*, the then aldermen of the above-mentioned companies or fraternities, at a meeting called by those aldermen as a common guild, but without the concurrence of the bailiffs, and for which reason the bailiffs did not attend it, although they had notice, and was on that day given so signed to the Plaintiff to pay the rent due at *Whitsuntide* then last to them the said aldermen, or to whom they should appoint. *Thomas Clennell*, who signed the above notice, was the *Thomas Clennell* mentioned in, and a party to the above indenture of lease. In consequence of this notice the Plaintiff refused to pay that rent *to the bailiffs of the said borough:* and on the twenty-eighth of the same *September* the distress was made.

The seven aldermen who signed the above notice were the aldermen of the respective fraternities above-mentioned, not only at the time of signing thereof but also at the time when the last-mentioned half-year's rent became due, and at the time of the distress, *Benjamin Woodman* and *Robert Nevins*, who then and at those times were the bailiffs of the said borough in the latter end of *August* one thousand eight hundred and three gave a verbal authority to Mr. *Henry Brumell*, attorney at law, to distrain for this rent, who then told them that he had applied to the Defendant for that purpose, which they approved of.

The usage with respect to the custody of the common seal of the borough has been and is as follows: The common seal is kept in a chest or hutch belonging to the corporation, called the corporation hutch, which is locked with seven locks, the keys of which are kept by the seven aldermen, each of them keeping the key of a different

1806.

WOOD v TATE.

lock. The bailiffs keep the key of the door of the room in which the hutch is deposited and locked, and the aldermen cannot, without violence, in fact enter the same room without the consent of the bailiffs, nor can the bailiffs in fact get, without violence, at the contents of the corporation hutch. The aldermen attend the court-leet, not only as suitors to those courts, which they and all the other burgesses, when resident within the borough, are, but also for the purpose of certifying, and there they do severally certify to the steward of the said courts the names of the free brothers who have been recently elected of their respective companies or fraternities for burgesses or freemen. With respect to the bailiffs accounting, when they go out of office, for the receipts and disbursements, it appears from the book of the corporation, by the entries thereof from the year 1576 to the year 1791, both inclusive, that in 98 years, at various periods of that time, they accounted with the succeeding bailiffs, no other person being described as present; and in 75 years, at various periods also of that time, they accounted in some instances with the succeeding bailiffs, in the presence of the aldermen, and in other instances with the succeeding bailiffs and the aldermen and others, and in some instances, from the year 1752 till the year 1791, the accounts were signed as allowed, sometimes by the bailiffs only, and sometimes by the bailiffs and aldermen, who were present; and on such their accounting in the following years, (that is to say,) 1598, 1608, 1609, 1613, 1616, 1617, 1618, 1763, 1766, and from thence in every year until and in the year 1774, and also in the year 1777, and from thence in every year until and in the year 1791, the balance is stated in the entries in that book either to be put into the corporation hutch or paid to the succeeding bailiffs, for the town's use. The following entry also appears in that book, with the names of two persons

1806.

WOOD v. TATE.

described bailiffs, and five others described aldermen, (that is to say,) "16th *March* 1671, Memorandum, that the day and year abovesaid, at a meeting of the bailiffs and aldermen, and the burgesses, in the Tolbooth, it was unanimously agreed upon, that the bailiffs, every year at *St. Andrew*'s day, after they are out of their office, shall give to the succeeding bailiffs and aldermen and burgesses a true and just account of all monies received in their year. As witness our hands." But this entry is made in a part of the book distinct from the other entries; and the entries for the next ten succeeding years are of accounting before the bailiffs only for the town's account.

The question for the opinion of the Court was, Whether the Plaintiff was entitled to a verdict on the above issues? If not, a verdict was to be entered upon all or any of the above issues as the Court should think the said parties, or either of them, entitled.

Best Serjt. *for the Plaintiff.* The question intended to be raised by this action is, Whether the aldermen of the borough of *Morpeth* have any right to interfere in the letting of the premises upon which this distress was taken? But as it appears that the aldermen are parties to the lease under which the Plaintiff took the premises, and the rent is therein reserved to them, all argument upon the respective rights of the different members of the corporation seems to be precluded, since, without the concurrence of the aldermen, no distress can be taken. [*The Court* observed, that the lease not being under seal of the corporation was not valid, and that the corporate name was, "the bailiffs and burgesses of the borough of *Morpeth*," under whom the Defendant made cognizance.] The lease under which the Plaintiff took the premises is stated to have been made with the assent and consent "of the bailiffs and burgesses." Payment of rent

rent to any person, makes him who pays tenant to him who receives, and in this case rent has hitherto been paid to the corporation; nor does that payment cease till some of those persons who joined in the lease under which the Plaintiff took, gave him notice not to pay. In order to recover upon these issues the Defendant must make out that the Plaintiff is tenant to those who directed the distress to be taken. Now supposing the Plaintiff not to be tenant under the lease, but only by payment of rent; still the rent, though paid to the bailiffs, has been paid to them as officers of the corporation under which the Plaintiff held, and does not warrant the attempt now made, viz. to construe the payment of rent to the bailiffs in one character, as a payment to them in another character. If *B.*, *C.*, and *D.* join in leasing, they must also join in taking a distress. Here the Plaintiff has been in the occupation of premises belonging to the corporation, and has paid his rent to the proper persons, supposing him tenant to the corporation, and holding immediately under them. If *A.* hold land of *B.*, *C.*, *D.*, and *E.*, and pay his rent to *B.* and *C.* he does not thereby acknowlege himself tenant to *B.* and *C.*, but to *B.*, *C.*, *D.*, and *E.* The reddendum in the lease is to the "bailiffs, aldermen, and burgesses."

Lens Serjt. *contrà*, was stopped by the Court.

Sir JAMES MANSFIELD Ch. J. This is a sadly perverted case, and brought here with a view which, as the facts now stand, cannot be attained. It is a contest between two parties in the corporation; but the only question to which we can address our attention is, Whether there be enough stated to enable us to say, that the distress has been properly made? The name of the corporation appears to be "the bailiffs and burgesses of the borough of *Morpeth*," and the bailiffs are the persons

1806.

Wood v. Tate

whose duty it is to collect and receive the rents of the corporation. The aldermen, it is true, are parties to the lease, and the reddendum is to them, as well as "the bailiffs and burgesses," but it is to them in their corporate, and not in their individual capacity; for it is to them and their "successors," not "their heirs, executors, and administrators." The lease, indeed, throughout every part appears to have been intended as a corporation lease, though, when the parties execute, by mistake they affix their private seals instead of affixing the corporation seal. Up to this time the rent that has accrued has been paid to the bailiffs of the borough. The usage of the borough with respect to the mode of keeping the corporation seal is stated on the case, and, consistently with that usage, the bailiffs may have a right to lease the lands of the corporation, though to a certain degree under the control of the aldermen. Clearly the introduction of the aldermen into this lease was a blunder. This being the case, I can only consider this to have been intended to be a corporation lease of corporation lands to the Plaintiff, and to have been executed in a blundering manner. The Plaintiff has entered and paid his rent from time to time to the bailiffs of the borough, who are the proper persons to receive it. The lease then being void in consequence of the blunder in the mode of its execution, is not the Plaintiff tenant from year to year? And half a year's rent being now due, have not the corporation a right to distrain for that rent? That appears to me to be the plain result of all the facts stated in the case. Supposing the lease to have been properly executed, the only question would be, whether the introduction of the names of those persons who happened to be aldermen of the borough at the time of the execution would make the lease void? As at present advised, I think all that is introduced about the aldermen might be rejected as surplusage; and if so, the result would be

the

the same as it would be from any considering the lease void, and the tenancy as a tenancy from year to year, with half a year's rent due. 1806. WOOD v. TATE.

ROOKE J. I am of the same opinion. Supposing the bailiffs and burgesses to have granted a lease, and the aldermen to have refused to allow the corporation seal to be affixed, might they not have been compelled by *mandamus*? The question intended to be brought before us is, whether the aldermen are an integral part of the corporation or not. That question we cannot decide upon this case. The rent has been received from this Plaintiff during the space of eleven years, and now the aldermen want to put their negative on its being received as heretofore.

CHAMBRE J. This case does not bring before us the question that was intended to be raised, nor do I see how that question could be brought before us in such an action. The only question at present to be decided is, under whom the Plaintiff holds as tenant of the premises upon which the distress has been taken? It has been contended, that he holds under the aldermen; but that is contrary to all the facts stated in the case. Hitherto he has paid his rent to the persons whose duty it is to collect the corporation rents. Possibly the aldermen may have the power to control the use of the corporation seal, but when used the lease belongs to the principal officers of the corporation. It is enough however to say, we can see a tenancy from year to year under the corporation. It matters not what other persons have signed the lease, if it be signed by the proper officers. I agree with my Lord Chief Justice and my brother *Rooke*, in thinking, that in this case the material issues, viz. those on the recognizance, must be entered for the Defendant. The other issues will be for the Plaintiff.

1806.

June 23d.

HARPER v. M'CARTHY and Another

A. B C and *D.*, agreed to purchase a cargo of coals, in certain proportions, to be severally taken and received out of the ship by them respectively at the rate of 40 chaldrons *per* day, and to settle their turns among themselves, and further agreed that in case of any loss or demurrage, by not fixing on their respective turns, or by subsequent detention in working out the cargo, to hold themselves severally and respectively liable for their several and respective defaults at the rate of forty chaldrons *per* day, the whole cargo would have been cleared in nine days, but in consequence of one of the days being wet only five chaldrons were taken out on that day, and on the 10th day some of *A.*'s coals remained on board: Held that *working* days only were within the meaning of the contract, and that as one day was wet, *A.* was not bound to pay demurrage for the 10th day.

ASSUMPSIT upon the following contract.

"*London, November* 29th, 1805.

We whose names are hereunto subscribed as buyers, have this day severally bought of *Charles Johnson*, factor for *William Harper*, owner or master of the ship *Ann*, the several parts or proportions of the cargo or loading of *Holywell Main* coals, now on board the said ship, which are annexed and opposite to our respective signatures, (the whole cargo or loading being computed to be 336 chaldrons) at forty-four pounds ten shillings per score, with metage and market dues to be severally taken and received by us respectively, from and out of the said ship, at and after the rate of forty chaldrons per day, and to be paid for by us severally according to our respective proportions on delivery of the same, viz. one-third value in cash, one-third in a note of sixty days, dated on the market-day after delivery, payable to the order of *William Harper*, and the remaining one-third on the fourth market-day after the said delivery. And we the said buyers further severally agree to fix amongst ourselves the turns which we shall respectively take in working the said cargo, he or they whose turn shall happen to be the last, taking the full residue of the cargo, be the same more or less than the computation; and we severally hold ourselves liable to any loss or demurrage in case of detention occasioned by not fixing on our respective turns as aforesaid. And in case also of subsequent detention in working out the cargo, we hold ourselves severally and respectively liable for our several and respective defaults.

N. B.

1806.

HARPER v. M'CARTHY and Another.

N. B. The seller agrees to allow the buyer or buyers two pounds *per cent.* on the one-third, if paid in cash on the ship's delivery, and two pounds *per cent.* on one-third, if paid on the fourth market-day after the ship's delivery, with one shilling *per* score as scorage.

	Chaldrons.
1st, *William Hugh Jones*, buyer . .	84
4th, For *Daniel M'Carthy* and self, *Denis M'Carthy*, buyer	84
2d, For *Nathaniel West*, self, and *Joshua Rickman*, *Nathaniel Core*, buyer . .	84
3d, *William Jones*, buyer	84
Charles Johnson, factor."	

The breach laid in the declaration was, "that afterwards, to wit, on, &c. at, &c. the delivery of the said cargo of coals from and out of the said ship commenced, and that the same could and might and would have been delivered to the said respective buyers thereof from and out of the said ship, at and after the rate of 40 chaldrons *per* day, whereof the said Defendants had notice; but that by default of the aforesaid Defendants in not fixing on their turns, or not using or taking advantage of their turns, and not working the said cargo as they ought to have done, and according to the force, form, and effect of their said promise and undertaking, the said cargo was not taken out or received by them the said buyers thereof at and after the rate of 40 chaldrons a day, or any greater rate or quantity, but at and after a much less rate or quantity than 40 chaldrons *per* day; and that in consequence and by reason thereof, and of the default of the said Defendants in that behalf, the said ship was kept and detained on demurrage, and incumbered with the said cargo of coals for a much longer time than she would have been if their said share or proportion of the said cargo had been taken out and received at and after

1806.

HARPER v. M'CARTHY and Another

the rate of 40 chaldrons *per* day, to wit, for the space of one day beyond the time within which the said cargo could, and might, and would, and ought to have been taken out and received, if said Defendants had performed their said promise and undertaking; and which detention was occasioned by the default of said Defendants in that behalf; and that, by reason of the detention aforesaid, occasioned by the default of the said Defendants in manner aforesaid, the said Plaintiff not only lost and was deprived of the use and benefit of the said ship for and during the period aforesaid, and during which she was kept on demurrage as aforesaid, but was also obliged to pay, and did pay to the meters and public officers appointed to superintend, and who did attend to superintend the unloading and delivery of the said last-mentioned cargo, and to certain coal whippers or heavers who were employed on board the said ship for the purpose of delivering out and working her said cargo, and were kept and detained on board for that purpose, and with and under the impression that the said Defendants would have performed their said promise and undertaking, and were unnecessarily detained on board the same by reason of such default of the said Defendants as aforesaid, divers large sums of money amounting in the whole to a large sum of money, to wit, 3*l.* 16*s.* 3*d.* There was a second count upon an undertaking to clear, not stating the contract; a third count for not clearing at the rate and within the time provided by 43 *Geo.* 3. (*a*) *c.* 134. *s.* 37. *viz.* at the rate of 40 chaldrons *per* day, and a fourth count for demurrage.

This cause was tried before Sir *James Mansfield* Ch. J. at the *Guildhall* Sittings after last *Hilary* term, when it appeared that the turns of the Defendants, and the three other buyers, as to the working of the cargo, were de-

(a) Local and personal acts to be judicially noticed.

cided

cided by lot, and the Defendants drew the last lot; that the unloading of the cargo commenced on the 3d *December* 1805, and was proved by the meter to have been worked as follows:

			Chald	Vatts	Bush.
Dec. 3d.	*Tuesday.*	*W. H. Jones.*	15	3	0
4th.	*Wednesday.*	ditto.	21	0	0
	ditto.	ditto.	5	1	0
5th.	*Thursday.*	Thanksgiving day.	0	0	0
6th.	*Friday.*	*West* and Co.	21	0	0
		ditto.	10	2	0
		W. Jones.	36	3	0
7th.	*Saturday.*	*West* and Co.	26	1	0
		ditto.	10	2	0
9th.	*Monday.*	ditto.	5	1	0
10th.	*Tuesday.*	ditto.	10	2	0
		W. Jones.	26	1	0
		ditto.	15	3	0
		W. H. Jones.	10	2	0
11th.	*Wednesday.*	ditto.	5	1	0
		ditto.	15	3	0
		M'Carthy.	10	2	0
12th.	*Thursday.*	ditto	21	0	0
		W. Jones.	15	3	0
		M'Carthy.	21	0	0
13th.	*Friday.*	ditto.	10	2	0
14th.	*Saturday.*	ditto.	21	0	0
		ditto.	15	1	0
	11 days.		351	1	0
Deduct Thanksg. day	1				
	10 days delivering.				

It also appeared, that *Monday* the 9th *December* was a rainy day, and that the working of the cargo was so far impeded by the rain, that only 5 chaldrons and 1 vatt were

1806.

HARPER v. M'CARTHY and Another.

were unloaded on that day; that on the 10th day (exclusive of a *Sunday*, and the Thanksgiving-day, which intervened) part of the Defendant's coals remained on board, and that the Defendant's craft did non come alongside so soon as they ought to have done. At the rate of 40 chaldrons *per* day, each working day, the ship would have been cleared in nine days. The jury, under the direction of the Lord Chief Justice, found a verdict for the Defendants.

A rule *Nisi* for a new trial having been obtained in this term,

Best Serjt. was heard in support of the rule. By this contract the default in unloading within the time specified, or rather at the rate specified, is to be cast upon some one of the contracting parties; whereas if the words "we severally held ourselves liable," &c. had not been introduced into the contract, all the parties to the contract would have been liable as upon a joint contract. Forty chaldrons *per diem* is the rate at which the Defendants agreed to unload the vessel; and if they have not fulfilled that part of their contract, it is no excuse to allege that the rain prevented them from working the whole time, even if that excuse were true, which, as applied to these Defendants, it is not. In cases arising upon charter-parties it frequently happens that a ship is detained beyond the day stipulated, and that such detention is not imputable to the neglect of either party, yet the demurrage is paid by the freighter; nor was it ever known that the state of the weather was set up as an answer to such his liability. The same rule of law is applicable to this contract, and, indeed, if it were not, it might be contended with success, that a single hour's interruption in the unloading of the cargo by rain or any other cause would release the Defendants from their contract to unload at the rate of 40 chaldrons each day.

1806.

HARPER v. M'CARTHY and Another.

day. According to the plain and obvious meaning of this contract, the loss arising from delay in unloading the cargo is to fall upon the party whose business it is to unload, and not upon the ship owner. The Defendants and their co-contractors are in the nature of insurers as to the rate at which the cargo is to be taken out. In *Cook* v. *Jennings*, 7 *T. R.* 384. Lord *Kenyon* says, "if *A.* covenant to infeoff *B.*, *A.* is not released from his covenant, though *B.* will not accept livery of seisin, unless the act be frustrated by the act of the covenantee." The rain in this case is the 3d person that prevents the performance of the covenant, and not the covenantee himself. In *Shubrick* v. *Salmond*, 3 *Burr.* 1640., contrary winds and bad weather were held to be no excuse to the owner of a ship in an action by the freighter for not reaching his port of destination by a given day, Lord *Mansfield* observing "the Defendant became the insurer of the risk of his getting there before the 1st of *March*." The words in this contract "at and after the rate of 40 chaldrons *per* day" is a positive contract to unload the ship in such a time as it can be unloaded in by such a daily discharge. A loss must fall on one of the parties to this contract; it ought therefore to fall on the party who covenants that no such loss shall happen.

Sir JAMES MANSFIELD Ch. J. The dispute between these parties turns on the true construction of the contract. I doubted at the trial; but, upon the whole, I thought that the Defendant had done all that he was bound to do under his agreement. The contract is not to unload the cargo in a given number of days, nor is it a joint contract. The words of the contract are, "to be *severally* taken and received by us respectively from and out of the said ship at and after the rate of 40 chaldrons *per* day;" now this imports that some other person is to deliver, and that the Defendants are to take and receive only;

1806.

HARPER v. M'CARTHY and Another.

only; it then adds, "to be paid for by us severally according to our respective proportions." In another part the expression is "we *severally* agree to hold ourselves liable" for not fixing the turns; and again at the conclusion of the agreement, "in case of subsequent detention in working out the cargo, we hold ourselves severally and respectively liable for our several and respective defaults." On the part of the Plaintiff it is contended, that this case resembles those which arise on charter-parties, where so much freight is stipulated for, the cargo being to be delivered in a certain number of days under the penalty of incurring demurrage. For the Defendants it is insisted, that such is not the meaning of the contract, but that inasmuch as each contractor buys a separate part of the cargo, and each is to be liable for his own default, none of them can ever be obliged to take out more than 40 chaldrons *per* day, and that by the aid of mere common sense the contract must be so interpreted that if any of the parties is prevented from receiving his full 40 chaldrons on any one day, not by his own default, but by an accident, which makes it impossible to deliver so large a quantity, the whole time for unloading thereby becomes lengthened by the quantity so thrown out of one day, and which need not be added to the 40 chaldrons of any other day. The persons who make these contracts must be understood to make them with a view to the number of craft they can employ. Undoubtedly if on these days when they are not unavoidably prevented from taking and receiving, they still do not take and receive, they must make up the difference by taking and receiving more on some other day. The default here seems to me to have arisen from the accident of the rain having on one of the days made it impossible to take and receive the full quantity, and I think, therefore, that the Defendants have satisfied the true meaning of the contract by taking and receiving at and after the rate of 40 chaldrons *per* day.

If

If such be not the true construction of the agreement the Defendants would have been liable to demurrage, though the rain had continued during nine successive days. It has been contended, indeed, that the Defendants, with their co-contractors, have, as it were, insured that all the coals shall be taken out of the ship within a certain time. I do not, however, find any foundation for that observation on the face of the contract. The word "default," used in the agreement, is a very emphatical word. The coals would all have been unloaded if it had not been for the wet day. Can it then be said, in any fair sense of the word "default," that the Defendants are chargeable in consequence of this accident? The contracts entered into in charter-parties are very different from this; for these parties expressly stipulate to deliver the cargo within a given number of days. But the contract here is to receive and not to deliver; and the delay that has occurred arose from the circumstance of the weather being such that no delivery could take place. On the fair construction of the contract, therefore, that day must be considered as no day. Suppose the unloading had gone on regularly for many days at the rate of 40 chaldrons *per* day, and then no sacks could have been procured, would the Defendants have been guilty of a default in not taking and receiving what for want of sacks could not be delivered to them? It seems to me that any day on which it is impossible to fulfil the contract is to be considered as no day within the meaning of the contract, each person being only liable for his own default, and consequently that these Defendants have been guilty of no breach of their contract, inasmuch as they are not chargeable with any default. The case of *Shubrick* v. *Salmond* has no application in this case.

ROOKE J. I am of the same opinion. This case does not turn upon any general principles of law, but upon the peculiar

1806.

HARPER v. M'CARTHY and Another.

peculiar nature of the contract. Where a contract is express it must be strictly complied with; but here the contract is very equivocal, and its terms favourable to the Defendant. It is not a contract that the cargo shall be delivered within nine days; that construction is only implied from the agreement to take and receive them at and after the rate of 40 chaldron *per* day. But nothing can be more easy than to specify the precise time within which the cargo shall be unloaded, if it be the intention of the parties to have it unloaded within a precise time. The parties to the contract make themselves severally liable for their respective defaults. In order to see whether the Defendants are guilty of any default we must inquire whether the coals have been taken and received by them at and after the rate of 40 chaldrons *per* day. Within the true meaning of the agreement no day is to be deemed a day but what is such in the common course of business. In short, the Defendants are to take and receive, if those whose business it is to deliver are able to deliver. If the contract had been to unload in nine days, then, *Sunday* intervening, the Defendants must have worked double on some other day. Such days only as were fit for work appear to me within the contract. Suppose the servants of those whose business it was to deliver had refused to work, could any default in the Defendants have arisen from such non-delivery? The question, therefore, is, Whether on this agreement, if a wet day intervene during the early turns, any of the later turns are thereby driven to take and receive a larger quantity than at and after the rate of 40 chaldrons *per* day? The time employed in unloading is calculated to unload the vessel at a certain rate *per* day, and there is not an additional number of craft to remedy the loss of time occasioned by each wet day.

CHAMBRE

1806.

HARPER v. M'CARTHY and Another.

CHAMBRE J. I see this question in a different point of view. The contract is certainly rather obscurely worded, but were it not for the opinions already delivered, I should have no difficulty in construing it to be a contract for the unloading of the coals in so many days. It is true the agreement does not expressly state that the coals shall be unloaded in any specified number of days, but it says they shall be taken and received at and after the rate of 40 chaldrons *per* day. It becomes, therefore, a mere matter of computation within how many days the cargo is to be unloaded. From this computation *Sundays* and Fast or Thanksgiving days are to be excluded, because the law excludes them. But I cannot think that an intervening wet day is any excuse. On the face of the contract there is no impracticability. Indeed it appears that 68 chaldrons were taken out on one day; therefore it is clear they might all have been removed within the time. Why are we to vary the contract? The contract is either to take and receive the coals or pay the demurrage. Supposing every one of the nine days to have been wet, the loss must have fallen on the buyers. The engagement is not express that the cargo shall be unloaded within a certain time, but if it be not unloaded that the buyer shall pay for the delay. There appears to me more difficulty in explaining the contract with respect to the defaults of the purchasers, and in deciding how they are respectively liable. But in this case there seems to be a default expressly fixed on the Defendants. Even if we allow them the benefit of the surplus quantity of coals removed in some of the days in the preceding turns they would not have executed their agreement. I think we should be opening a great field for litigation, if, upon the construction of these contracts, we were not to hold the buyers liable to demurrage, where even by wet weather they are prevented from taking and receiving the coals at the stipulated rate *per* day; and that we should have

1806.

HARPER v. M'CARTHY and Another.

have to inquire with much minuteness how much of the weather was wet and how much dry. Here the coals have not been taken and received at and after the rate of 40 chaldrons *per* day; I think, therefore, the Plaintiff is entitled to a new trial.

Rule discharged.

Mr. Justice Heath was absent during the whole of this term from indisposition.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Michaelmas Term;

AND IN THE

HOUSE OF LORDS;

In the Forty-seventh Year of the Reign of GEORGE III.

(IN THE HOUSE OF LORDS.)

LUCENA *v.* CRAUFURD and Others in Error.

July 10th.

THIS was a writ of error, brought to revise the judgments of the Courts of King's Bench and Exchequer-chamber, given for the Defendants in error upon a bill of exceptions.

For an abstract of the record in this case, see 3 *Bos. & Pull.* 75. In addition to what is there to be found, it is now material to state (what was not supposed to be of any consequence at the time of the argument in the Exchequer-chamber) that the first count of the declaration

1806.

LUCENA v. CRAUFURD and Others, in Error.

particularised the periods at which the several ships therein mentioned were lost. It averred that the *Houghley*, with part of her cargo, was lost by perils of the seas on the 1st of *September* 1795; that the *Surchéance* and her cargo were lost by perils of the sea on the 5th of *September* 1795; that the *Dordrecht* was disabled by perils of the sea on the 13th of *September* 1795, but was carried into *Ireland* and there sold, and the cargo brought to *London*; and that the *Zeeleiye* was lost by perils of the sea on the 20th of *September* 1795. That the second count upon which a verdict was found for the Defendent below averred the interest in the property insured to be in his majesty; that the policy was made on his majesty's account, and that the commissioners had given directions to the agents to negociate policies on his majesty's account. And that the third count, upon which a verdict was also found for the Defendant below, averred that the ships and cargoes were the property of foreigners.

The Plaintiff in error having assigned the same errors as in the Exchequer-chamber, prayed that the judgment of that Court might be reversed; for the following among other REASONS:

1st, Because a policy of insurance being both in form and in substance a contract of indemnity, the party who claims the benefit of indemnification under it must shew that a loss has been sustained by him upon the subject insured, and for that purpose must necessarily prove that he had at the time some right of property in that subject susceptible of loss or damnification.

2d, Because there is a material distinction between a contract of wager and a contract of insurance; the first may have for its subject any speculative chance or expectation, however vague or uncertain, and may be claimed without proof of loss or damage having accrued to the party for whose benefit it is demanded; but a contract of insurance cannot have such chance or expectation for its object, because bare chance or expectation, though

though liable to failure and disappointment, are not susceptible of loss or damnification, and therefore cannot be made the objects of an indemnity, which presupposes the loss of some right of property, either in possession or in action.

3d, Because in the first count of the declaration it is alleged by the Defendants in error, that they, as commissioners under and by virtue of the said act of parliament, and the said commission at the time of the sailing of the said ships from *St. Helena*, and from thence until the time of the losses, were interested in the said ships and goods to the amount of the money insured, and that the insurance was made for their use, benefit, and account, as such commissioners: this is a material allegation, importing that the object of the insurance was an interest which the Defendants in error themselves had, and disavowing its having been effected for the use, benefit, or account of any other persons. In maintenance of such averment the Defendants in error are bound to prove an interest in themselves, which will support an insurance made on their own account, and proof of an interest in other persons for whose benefit they might have made an insurance, cannot upon this record avail them.

4th, Because in legal language "to be interested in" or "to have an interest in," any given property, does not merely denote an anxiety or solicitude for, or even an expected benefit from, its preservation. But it imports a right of property in it, either general or special, in possession or in action, defeasible or indefeasible. No other interest is capable of being vindicated either in law, or in equity, or is susceptible of loss or damnification, and therefore no other can be made the subject of a contract of indemnity.

5th, Because the authority, power, and interest of the Defendants in error, as commissioners, is founded upon

1806.

LUCENA v. CRAUFURD. and Others, in Error.

and circumscribed by the act of 35 *Geo* 3. *c.* 80. *s.* 21.; and the commissioners granted by his majesty neither did nor could exceed the powers given by that act. The Defendants in error are thereby authorised to take into their possession and under their care, all ships and cargoes belonging to the inhabitants of the *United Provinces* which had then been or might thereafter be detained in or brought into the ports of this kingdom. The power, authority, and interest of the Defendants in error, is confined to ships and cargoes, "detained in or brought into the ports of this kingdom:" beyond that description of property they had neither power, authority, or interest. As agents they had no other ships or cargoes to take care of, and as commissioners they could not have property or interest in any, except those which the statute and their commission, had actually attached upon. When the ships in question sailed from *St. Helena* they had not been detained in or brought into the ports of this kingdom, and did not come within the description of property in or over which the Defendants in error, had any sort of interest, power, or authority. It is not therefore true, as they have alleged, that they as commissioners were interested in the said ships and goods, at the time of their sailing from *St. Helena*, though they might possibly be anxious and solicitious for, and expect a benefit from, their being brought into the ports of this kingdom, and thereby placed under their power and authority. As commissioners they could not possibly have any other description of interest in these ships or cargoes before their arrival in *England*.

6th, It is stipulated by the policy, that the adventure on the goods to be insured by it, should begin from their being loaded on board the ships at *St. Helena*. The loading of the goods at *St. Helena* is therefore a condition precedent to the inception of the risk upon them, and it not appearing upon the record that this condition has

1806.

LUCENA v. CRAUFURD and Others, in Error.

has been complied with, but on the contrary it being stated in the declaration, by the Defendants in error, that the goods were not loaded at *St. Helena*, the Plaintiffs in error cannot be compelled to perform their part of the contract.

T. ERSKINE.
D. GILES.

The Defendants in error prayed that the said judgment might be affirmed; for the following among other REASONS:

1st, Because the ships and goods whereon the assurance was made were ships and goods belonging to the inhabitants of the *United Provinces*, intended and directed by his majesty to be brought into the ports of this kingdom, and under the circumstances in which they stood, when they were insured, would, if they had arrived in this kingdom, have come to the possession and been under and subject to the management, sale, and disposition of the Defendants in error, as commissioners by virtue of the before mentioned commission and act of parliament, which in express terms authorized them to take into their possession, and under their care, and to manage, sell, or otherwise dispose of, ships, goods, and effects belonging to the inhabitants of the *United Provinces*, which had been or might be detained in or brought into the ports of this kingdom, and although those ships and goods were (after making the insurance, upon the breaking out of hostilities between this kingdom and the *United Provinces*,) condemned in the High Court of Admiralty, as prize, yet that did not vary the destination or disposition of those ships and goods, especially as his majesty, in his instructions to the Court of Admiralty for the adjudication of such ships and goods as prize, has expressly reserved to the Defendants in error the care, sale, and management thereof, as well

before

1806.

LUCENA v. CRAUFURD and Others, in Error.

before as after final adjudication, according to the provisions of the said act.

2d, Because the defendants in error (in the event of the ships and goods insured coming into this kingdom) were by the act of parliament and commission constituted trustees or consignees thereof, and would have had a power to take them into their custody, and to manage, sell, or otherwise dispose of them for the benefit of his majesty, or such others as might be beneficially entitled thereto; and nothing but the perils and dangers insured against by the policy could prevent those ships and goods from actually coming to the custody, possession and power of the Defendants in error under the act of parliament and commission. Such a contingent interest, it is submitted is an interest upon which a legal and valid assurance may attach, the object of it not being gaming or wagering, but really and *bonâ fide* to secure to the Defendants in error, as trustees or consignees for others, the benefits which would accrue if the insured property arrived, and which would be lost if that property were lost.

V. GIBBS.
J. A. PARK.
G. WOOD.

The case was argued during *Trinity* term 1804, at the bar of the House by *Erskine* and *Giles* for the Plaintiff in error, and by *Gibbs* and *Park* for the Defendants in error.

On the motion of the Lord Chancellor (*Eldon*) the following questions were proposed to the learned Judges on the 4th of *February* 1805.

1st, Whether regard being had to the true meaning and legal effect of the act of the 35th year of his majesty's reign, in the first count of the declaration mentioned, and the royal commission in the said count mentioned, bearing

bearing date the 13th day of *June* 1795, it was or was not in law competent to his majesty to order the several ships, goods, and merchandizes in the said first count mentioned as belonging to subjects or inhabitants of the *United Provinces*, and therein mentioned to have been taken and seised at sea by the commander of one of his majesty's ships of war to the intent that the same might be brought into the ports of *Great Britain* to be restored (after the same had been so taken and seized) to the subjects and inhabitants of the said *United Provinces* to whom they respectively belonged, either whilst such ships and goods were upon the voyage in the said count mentioned, and before they were brought into the ports of *Great Britain*, or upon their arrival in such ports, or to order and direct such ships and goods to be carried into any ports of *Great Britain*?

2nd, Whether, according to the true intent, meaning, and legal effect of the said act of parliament and commission, and regard being had to his majesty's legal right and interest in the property of enemies taken and seized before hostilities, but remaining at the time when hostilities take place in possession of those who by his orders had previously taken and seized the same, the plaintiffs in this case, as such commissioners, as in the first count of the declaration mentioned, had any and what legal interest in or authority to take into their possession and under their care, and to manage, sell, and dispose of according to the said act of parliament and commission, and such commissioners as aforesaid, all or any of the ships mentioned in the said count, or their cargoes, which arrived in the ports of *Great Britain* after the issuing of his majesty's proclamation of the 15th day of *September* 1795, proved and given in evidence to the jury in this cause, or after hostilities were commenced by his majesty against the *United Provinces* in the declaration mentiond?

1806.

LUCENA v. CRAUFURD and Others, in Error.

3d, Whether upon the matters appearing to have been produced and given in evidence in this cause, if true, the Plaintiffs, notwithstanding such act and commission as aforesaid, were duly and effectually constituted agents on behalf of his majesty for the care and management of such of the several *Dutch* ships mentioned in the order of council of the 26th of *November* 1795, (given in evidence in this cause) to have been sent into the kingdom of *Ireland*, as are mentioned in the 1st count of the said declaration, and in the said order, and the sole interest in which ships so sent in is by the said order alleged to be vested in his majesty. And whether after such order, and after the Plaintiffs took possession in *Ireland*, and after such declaration of hostilities as aforesaid, the authority of the Plaintiffs to continue such ships under their care and management in *Ireland*, or in *Great Britain*, was an authority to be considered in law as vested in them as such commissioners as in the declaration mentioned by virtue of the said act of parliament and commission aforesaid, or as agents appointed by the said orders in council, regard being had to the effect of the said proclamation of the said 15th *September* 1795, and the proceedings and sentences of the high Court of Admiralty given in evidence in this cause?

4th, Whether upon the several matters produced and given in evidence to the jury in this cause, if true, the said ships and goods in the declaration mentioned to have been lost, as to each of the said ships respectively, and the goods laden on board each of them respectively, regard being had to the respective times of the losses thereof as stated in the first count of the declaration, and the date of such proclamation as aforesaid, and all the matters produced in evidence, and to such orders and directions, if any, as his majesty might lawfully give respecting the restoration thereof to the subjects and inhabitants of the *United Provinces*, to whom they had belonged,

longed, or respecting their destination to other ports than those of *Great Britain*, were ships and goods which according to the legal meaning of the averment in the said first count in the said declaration, if they had arrived at the port of *London* from the voyage in the declaration mentioned, the Plaintiffs as such commissioners as in the declaration mentioned were and would upon such arrival have been authorised to take into their possession and under their care, and to manage, sell, and dispose of, according to the effect and form of the said commission and act of parliament, as the plaintiffs have in the first count of their declaration alleged?

5th, Whether upon the several matters so produced and given in evidence, if true, and such regard being had as aforesaid, the Plaintiffs, as such commissioners aforesaid, under and by virtue of the said act of parliament and commission, were at the time of the sailing of the ships in the said count of the declaration mentioned respectively from *St. Helena*, as in the said count is mentioned, and from thence, and until, and at the time of the several losses herein mentioned interested in the said ships and goods in any and what manner, and according to the legal meaning of the said word "interested," as used in the first count of the declaration; so that a legal and valid assurance could be effected on the said goods, and on the bodies of the said ships, by the Plaintiffs as such commissioners for their use, benefit, and account as such commissioners?

6th, Whether if the said several averments, or either of them according to the legal import thereof, are or is not made good by the several matters produced and given in evidence in this cause on the part of the Plaintiffs, the Plaintiffs can in point of law be considered as having maintained the issue on their parts? And whether such averments, or either of them, are necessary to be made good in this case, or can be rejected as surplusage? Whether after the passing of the 19 *Geo. 2. c.* 37. it was necessary

1806.

LUCENA v. CRAUFURD and Others, in Error.

necessary in the law in a declaration in an action brought upon a policy of assurance effected upon a *British* ship for the Plaintiff in such action, to make any averment touching his interest therein, which was not necessary to be made in such declaration previous to the passing of that act of parliament?

7th, Whether the said Plaintiffs, as such commissioners as in the said first count of the said declaration mentioned, had in law any such interest in the bodies of the said ships respectively, and goods laden therein respectively and assured, as was capable of being abandoned by them in any circumstances as such commissioners or otherwise to the assurers, and more especially after the issuing of the said proclamation of the 15th *September* 1795; and if not, whether their incapacity to make such abandonment does in law in any manner affect the validity of the assurance stated by the said first count to have been made as therein is mentioned?

8th, Whether assuming that the Plaintiffs, as such commissioners as aforesaid, would be entitled to a reasonable recompence or profit for service to be performed in respect to the ships and goods in the first count mentioned, in case the same should arrive in a *British* port, their title to such recompence or profit was by law insurable against marine risques happening antecedent to their arrival, and consequently previous to the period of such service. And in case the same was by law insurable, was it necessarythat the assurance should be made conformable to the enactment in the first section of the act 19 *Geo.* 2. *c.* 37? And can the policy of assurance in the first count of the declaration in this case stated be considered as a policy effected on such interest of the commissioners, if such they had, and the same is an insurable interest?

The learned Judges not being agreed upon all the answers to be given to the above questions, delivered their

opinions

opinions in the following order, on several days, in the months of *June* and *July* 1806.

GRAHAM Baron (*a*), CHAMBRE J., LE BLANC J., LAWRENCE J., ROOKE J., GROSE J., THOMPSON Baron, HEATH J., M'DONALD Ch. Baron, and Sir JAMES MANSFIELD Ch. J. of the Common Pleas.

Upon the first question the learned Judges were unanimously of opinion that it was in law competent to his majesty to order the several ships, goods, and merchandizes in the first count of the declaration mentioned to be restored to the subjects and inhabitants of the *United Provinces*, to whom they respectively belonged, either while such ships and goods were upon the voyage and before they were brought into the ports of *Great Britain*, or upon their arrival in such ports, or to order such ships and goods to be carried into any ports other than the ports of *Great Britain*. They thought that the words of the 35 *Geo.* 3. *c.* 80. *s.* 21. empowering his majesty to authorize the commissioners to take such ships and cargoes into their possession and under their care, and to manage, sell, or otherwise dispose of the same to the best advantage, must be confined to a disposition of such ships and cargoes of a similar nature to what is expressed by the accompanying words, namely, a disposition, the object of which should be to prevent the ships and goods from perishing, and that as there was nothing in the act of parliament restraining the king's prerogative, his right to restore the ships and cargoes to the *Dutch* owners could not be taken away; though with regard to such ships and cargoes as had actually arrived in the ports of *Great Britain*, and been taken possession of by the commissioners, some of the learned Judges observed that a

(*a*) Mr. Baron *Sutton* not having been upon the bench at the time when the case was argued, gave no opinion.

further

1806.

LUCENA v. CRAUFURD. and others. in Error.

further order of Council might perhaps be necessary to authorize the commissioners to restore them.

To the second question, GRAHAM Baron, ROOKE J., GROSE J., HEATH J., and Sir JAMES MANSFIELD Ch. J., answered in the affirmative, and argued in substance as follows.—It is clear that the declaration of hostilies gave to the king an inchoate exclusive right to whatever of these ships and goods was liable to be condemned as prize, and that the king had the sole right, if he had been pleased to exercise it, of taking all these ships on their arrival in *Great Britain* or elsewhere into his own possession, and under his own care, and of appointing agents and disposing of them as he might think fit. But at the date of the act of parliament and commission, and when the order for the seizure of these ships was issued, the event of a commencement of hostilities was undoubtedly in contemplation. It might almost be said to have been impending and foreseen as unavoidable. It could not therefore have been the intention of the legislature or of the king to appoint a commission at great expence, and with great preparation, which an event so probable and imminent was *ipso facto* to annul. Nothing can be more general than the words of the commission; they refer to ships which were seized, or ordered to be seized, without any limitation of the time when the power of the commissioners should cease. Nor is there any reason why the event of hostilities should make any difference. Though the king was put in the place of the *Dutch* proprietors, the objects of the commission remained essentially the same. It was not an ordinary case of prize. Many of the *Dutch* proprietors were known to be well affected to this country; many might be expected to take refuge here. It was a principal object of the commissioners to inquire how they stood affected, and to dispose of the property accordingly. Powers in

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amity with this country, neutrals, and *British* subjects on the faith of the neutrality of *Holland*, had embarked large property on board these vessels, and these interests could only be provided for by a special commission. The power of these commissioners was much more extensive than that of prize agents; for the power of a prize agent extends only to the taking care of a ship and managing it during the existence of a suit in the Admiralty court. No person could possibly suffer from the continuance of this power in the commissioners: they were to take possession and manage for the benefit of those who might be ultimately entitled, whether the *Dutch* owners or the king. The king might certainly have revoked this power if he had thought fit; but he has not done so by any public act or declaration. The crown appointed them prize agents for the purpose of giving them as much power over the ships in question in the ports of *Ireland* as they had under the original commission in the ports of this kingdom, and to enable them to bring the ships within their jurisdiction as commissioners. This interpretation is warranted by the king's instructions to the Court of Admiralty, dated the 10th day of *October*, which were given almost a month after the declaration of hostilities (15th of *September*), and which suppose that the commissioners may take possession of ships after that time to be brought into *Great Britain*. They direct the Admiralty to proceed to the adjudication of such ships, &c. "of which possession had been taken or should be taken by the said commissioners," and reserved to the commissioners the care, sale, and management thereof, as well before as after final adjudication. In the ordinary course of proceedings prize agents would be appointed for the management of these ships; but by these instructions the king, without conferring any new power on the commissioners, reserves to them the care, sale, and management of the ships. According to the

argument,

1806.

LUCENA v. CRAUFURD and Others, in Error.

argument, therefore, of the Plaintiff in error, the king encourages the commissioners unlawfully to take possession of these ships, and then directs the ordinary course of the Admiralty Court to be suspended in their favour that they may exercise a power which they illegally assumed to themselves. The special pleader who drew the case of the plaintiff in error seems to have been aware of the importance of those words of the instruction (*a*), which refer to a future taking possession of ships and goods, and has omitted them: this omission can hardly be supposed to have arisen from mistake: it was indeed a singular omission, when so much had been said about the supposed contingency of the power of the commissioners: for the ships in question had not arrived, and never could arrive before the declaration of hostilities. It seems therefore to have been the intention of the crown that these persons should act as commissioners within, and as prize agents without the realm. There can be no implied revocation contrary to the manifest intention of the crown. Nor can a grant of the crown enure to a double intent, as the grant of a subject may. If a subject grant lands to his villein, it shall operate not only as a conveyance of the lands, but as an enfranchisement; it is not so in the case of the crown: this was laid down in *Plowd. Com.* 502. In the case of Sir *Walter Raleigh* it is well known that when under sentence of death he consulted Sir *Francis Bacon*, then Solicitor-General, whether he should sue out his pardon; who advised him not to do it, and told him that the granting a commission would operate as a pardon, and recommended him to apply for one, which he did; but his

(*a*) In stating the instructions to the Admiralty of the 10th *October* 1795, to "proceed to the adjudication of such ships and goods of which possession has been taken or *shall be taken*, by the said commissioners, &c. reserving to the said commissioners the care, sale, and management thereof;" the printed case of the Plaintiff in error omitted the words "or shall be taken."

expedition

expedition having failed, he was taken up under his former sentence; he produced his commission, and urged his right to a pardon; but found, to the cost of his life, that he had been ill advised. It has been insisted that a state of war divests the commissioners of all the powers granted by the commission. To this it may be answered, that a change of circumstances alone will not operate as a revocation. There must be an absolute repugnance and inconsistency. But here the letters of reprisals, if a revocation, would operate against the declared intention of the crown; which could not be even in some cases of private grants. Thus in the case of the statute of uses, the statute says that the uses shall never be executed contrary to the intention of the party: the intention of the party shall prevail over the positive words of the act of parliament. Certainly the officers of the crown, in drawing the instructions to the Admiralty did not consider the power of the commissioners as revoked. But admitting that they were, the consequence now contended for might not follow: A policy of insurance is assignable, and if the crown had appointed other persons as prize agents, there is no reason why the commissioners might not by order of the crown have been authorized to assign the policy. Then being the same persons, there can be no assignment; but they ought to have the same benefit as prize agents as they would have had if there had been no prize agents, or hostilities had not commenced; and this benefit they may have consistently with the averments of the declaration; for though a policy may be assigned by the law merchant, yet the action must be brought in the name of the original insured.

CHAMBRE J., LE BLANC J., LAWRENCE J., THOMPSON B., and MACDONALD Ch. B. answered in the negative, and argued thus:—The king has the sole right and interest in enemies property from the time when hostilities

1806.

LUCENA v. CRAUFURD and Others, in Error

ties commence: this appears by the adjudications of the Admiralty. The orders in council of *January* 1795 were made for the purpose of offering protection to those inhabitants of the *United Provinces* who entertained a favourable disposition towards this country, by opening our ports for the reception of their ships; but neither these orders nor the acts past in aid of them assume any dominion over the property; but on the 9th of *February* it was thought necessary to have recourse to other measures, and to use force with respect to ships not meant to be sent here, but going either to or from *Dutch* harbours, and instructions were given for their seizure and detention, and an order for that purpose transmitted by the Admiralty to the commanders of ships of war. On the 16th of *March* 1795 an act passed for the further protection of the property voluntarily brought in, and on the 22d of *May*, the 35 *Geo. 3. c.* 80. (being the act referred to in the question) passed. The subject of this latter act, and the commission to the Plaintiffs, was the *Dutch* property which was or should be seized and detained in pursuance of the instructions of the 9th of *February*. The instructions are to bring into *British* ports all *Dutch* vessels bound to or from any ports in *Holland*, in order that they with their cargoes, being *Dutch* property, may be detained *provisionally*. The title of the act is, "An act to make further provision respecting ships and effects coming to this kingdom to take the benefit of his majesty's orders in council of the 16th and 21st of *January* 1795, and to provide for the disposal of other ships and effects detained in or brought into the ports of this kingdom;" thus distinguishing between the two classes of property. The object of the first twenty sections is to protect property voluntarily brought in, and to authorize the disposal of it by the owners without subjecting it to any hostile restraint. The subject of the 21st section, which authorizes the commission and defines the powers and duties

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of the commissioners, is property detained by force. That section recites, that several *Dutch* ships and property had been or might be detained in or brought into this kingdom, and might perish or be greatly injured if some provision was not made respecting the same, and then authorizes the Crown to appoint commissioners to take such ships and cargoes into their possession and under their care, and to sell the same. The property therefore subjected to the commissioners was only property detained by force, and not detained as prize, or for the immediate purpose of changing the property, but in the language of the instructions detained provisionally. Of the nature of the instructions there can be no doubt. The relation between the *United Provinces* and this country was ambiguous. It was probable that the former might soon assume the character of enemies, but they had not done so; nor was it resolved to treat them as enemies, though they could not be trusted as friends. A provisional detention of property therefore was resorted to as a measure of caution; and what could be the meaning of detaining it provisionally, but that the detention should cease when the relative state of the two countries should be decided, either by the restoration of amity, or the commencement of hostilities. Doctor *Johnson*, in explanation of the word *provisionally*, refers to *Locke* on the Human Understanding, who relates a story of an abbot of *St. Martin*, who when he was born had so little the figure of a man, that it bespoke him rather a monster: it was for some time under deliberation whether he should be baptized or no; however he was baptized, and declared to be a man *provisionally*, of which Mr. *Locke*'s explanation is, "till time should shew what he would prove:" so here the word provisionally cannot be understood otherways than as limiting the detention till time should shew what the *Dutch* would prove. The recitals of the act, the natures of the powers, given to the com-

1806.

LUCENA v. CRAUFURD and Others in Error.

missioners, and the inconsistency of some of them with the rights of the original owners, when force could no longer be used with propriety, and with the rights of the captors, and the jurisdiction of the courts of Admiralty after hostilities, still more plainly demonstrate the intent to limit the operation of the act and the authority of the commissioners to property provisionally detained. The act recites that the ships or cargoes might perish or be injured, and there being no captors interested or any Court of competent jurisdiction to interpose, commissioners are appointed and authorized to sell. But when the cause of provisional detension had ceased, and the rights of the parties either as original owners or captors been ascertained, how could sales by the commissioners be reconcileable with the undoubted rights of the owners, or the captors, the law of nations, or the security of purchasers. Before the commencement of hostilities it was doubtful whether any act of the subjects of this country respecting the custody, sale, or disposition of this property could by the common law be justified, or any property legally conveyed to a purchaser of any of those articles of which an immediate sale might be necessary or convenient. This state of things called for the interposition of the Legislature to legalize such acts as would otherwise have remained without the protection of the law; but the moment hostilities were proclaimed, the necessity of those provisions ceased, and the property became subject to the known and established rules of proceeding and management. The act and commission were intended to supply an authority where it was wanted, and there seems to be no reason to extend it to matters for the preservation of which a sufficient authority existed as the law then stood. Nor can the act be intended to narrow the right of the Crown by subjecting it to the control of the Privy Council in cases where the king by law might act without consulting them.

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To the third question GRAHAM B., ROOKE J., GROSE J., HEATH J., and MANSFIELD Ch. J. answered in the affirmative, that the plaintiffs were duly constituted prize agents of the *Dutch* ships sent into *Ireland*, and that they exercised their authority in *Ireland* in that character; but that their appointment as prize agents in *Ireland* was not inconsistent with nor in any respect intended to revoke or abridge their power as commissioners in *England*. And that as soon as the four ships mentioned in the declaration were brought by the king's orders into the ports of *England*, their authority as commissioners attached upon them. And they relied upon the reasons given in answer to the last question.

CHAMBRE J., LE BLANC J., LAWRENCE J., THOMPSON B., and MACDONALD Ch. B. answered, that the Plaintiffs were duly constituted prize agents of the said ships, and that their authority to continue such ships under their care and management as well in *Great Britain* as in *Ireland* was vested in them as agents appointed by order of council, and not as commissioners under the act. This answer they considered as following of course from the opinion before given, that after the commencement of hostilities the plaintiffs could only act under a new authority derived from the Crown, and not by virtue of the act of parliament. And with respect to the reservation contained in the order of council of the 10th of *October* 1795, they thought that it did not warrant any inference to the contrary. The only effect of that reservation being to limit their authority as prize agents by the powers which they enjoyed as commissioners.

To the fourth question, GRAHAM B., ROOKE J., GROSE J., HEATH J., and Sir JAMES MANSFIELD Ch. J. answered in the affirmative, considering the authority of the commissioners as subsisting notwithstanding the commencement of hostilities.

1806.

LUCENA v. CRAUFURD and Others, in Error.

LE BLANC J. also answered in the affirmative. He said that it appeared clearly from the subject matter of the first count, that the averment in question was not meant to convey an unqualified proposition, the authority of the commissioners being expressly set forth and defined; that the legal meaning of the averment, therefore, ought to be taken according to the state of things at the time of effecting the policy, without regard to possible contingencies, in which sense the averment was true. That if the averment was to be taken in an unlimited sense, it was impertinent and unnecessary to maintain the action; the ships having been already sufficiently described in the declaration to shew that they fell within the description of the act of parliament, and were the objects of the commission at the time when the policy was effected.

CHAMBRE J. answered in the negative. He said, that if the ships had arrived at the port of *London*, the Plaintiffs as commissioners would not have been authorized to take possession of them unless they had arrived before hostilities. That the *Zeelelye*, if she had come in at all, must have come in after that period, being at sea upon her voyage after the proclamation; and though the others which were lost, might but for that loss have arrived before hostilities, yet they might not have arrived till after; and that being a matter of uncertainty, the averment was not made out in proof either in respect of the *Zeelelye*, or of the other three ships, or any of them.

LAWRENCE J., THOMPSON B., and MACDONALD Ch.B. said, that as the *Zeelelye* was not lost till after hostilities the commissioners would not have been entitled to take possession of her if she had arrived, inasmuch as she could not arrive till after the proclamation. And with respect to the other ships, as they come within the description

scription of the act of parliament and commission, if they had arrived before the proclamation or any order for restoration, they would have been ships of which the commissioners would have had a right to take possession within the legal meaning of the averment, but not if the proclamation or any such order had been made before their arrival.

To the fifth question GRAHAM B., LE BLANC J., ROOK J., GROSE J., HEATH J., MACDONALD Ch. B., and Sir JAMES MANSFIELD Ch. J. answered in the affirmative as to all the ships, and argued in substance as follows:—The subject of the present insurance being the ships and goods themselves, and not any profit or commission expected to arise from the sale, management, or disposition of them, the arguments which are founded upon the uncertainty of such interests may be laid out of the question. There can be no doubt that the ships and goods were insurable: but the question is, whether the commissioners had a sufficient interest in those ships to authorize them to effect the insurance. The peculiar circumstances which attended the property insured are stated in the declaration: the act of parliament and commission are referred to; the seizure of the ships at sea for the purpose and to the intent of their being sent to this country and put into the possession of the commissioners is stated, and that the Plaintiffs effected the policy on those ships by name, not naming themselves individually as making the insurance, but as commissioners for the sale of *Dutch* property. It is with reference to these premises they aver, that they as such commissioners were interested, and that the insurance was made for their use and benefit as commissioners. The nature of their connection with the property insured appears from the previous part of the declaration. They claimed no beneficial interest in it: they were merely consignees, agents,

1806.

LUCENA v. CRAUFURD and Others, in Error.

or trustees for others; and to make the whole declaration consistent, the averment must be taken to import, what the words will fairly admit, that the insurance was made for the benefit of those, for whose benefit the Plaintiffs were authorized by the act of parliament and commission to manage the property as consignees; that is, in the present instance, for the king. A consignee without any beneficial interest in himself is agent for the consignor, and may insure for his benefit: and if such a consignee were to state in his declaration the circumstances of the consignment of goods to him to manage, sell, and dispose of for certain persons abroad, might he not aver the interest in himself as such consignee; and would not such an averment, coupled with the disclosure of his having no interest but for the consignor's use, be equivalent to an averment of interest in his consignors? If the words, "for their use and benefit," should be thought repugnant to this construction, those words may be rejected as surplusage; for the averment is to be construed according to the apparent intention, according to the rule *ut res magis valeat quam pereat*. Besides, upon the arrival of these ships the whole legal interest would have vested in the commissioners, though subject to the trusts specified. And as the law does not regard the use or trust of a chattel, they were at liberty in insuring to aver the interest in themselves. It was the clear intention of the act of parliament and commission that the commissioners should have the care and management of these ships and goods in as effectual a manner as the owners would have in ordinary cases; and they would certainly fall very far short of their purpose if they did not extend to give the commissioners a power to insure. The operation of the act and commission was to constitute the commissioners parliamentary trustees or consignees of the property; and vested in them an insurable interest for the benefit of those who might ultimately be entitled.

To

To such persons, whoever they might be, the Plaintiffs having insured in their character of commissioners, would be accountable for the produce of the insurance, as much as for the sale of the property itself if it had arrived. It was their duty to provide for the security of the property till the event should happen which would enable them to take possession; and in insuring they only followed the provisions of the act of parliament, and the commission founded upon it. The *Dutch* owners knowing nothing of the situation of the property could make no insurance. But if the commissioners were trustees, they were authorized to act respecting the property as if it was their own, for the manifest benefit of the *cestuy que trust*. If the commissioners had been ordered by the crown to insure, there can be no doubt that it would have been their duty to have obeyed: and whether they had any directions is a matter of private trust, not now to be inquired into. The insurance being for the benefit of those ultimately entitled, the approbation of the crown may be presumed. It is not necessary to consider whether if a mere stranger were to insure a ship, and such insurance were afterwards to be ratified by the owner, it would be valid. But there does not appear to be any rule of law to prevent it. It is not against the 19 *Geo.* 2. The insurance would be made by such person *bonâ fide* as agent for the owner, and if ratified why should it not, like any other contract, be binding on the parties? If this be so with respect to a private individual having no connection with the property, *à fortiori* the insurance by these commissioners must be good. Though a consignee be usually appointed by bill of lading, it is not necessary to invest a person with that character. Mr. Justice *Buller*, in the case of *Wolf* v. *Horncastle*, 1 *Bos. & Pul.* 322. defines a consignee to be a person residing at the port of delivery, to whom the goods are to be delivered on their arrival. A consignee, as distinguished from a vendee, is the

1806.

LUCENA v. CRAUFURD and Others, in Error.

the mere agent of the consignor: and such a consignee may be appointed by any direction, verbal or written, to the captain to deliver the goods to such particular person, or by a letter to the person himself requesting him to take care of the goods upon their arrival. Where then is the difference between such a consignee and these commissioners? The ships were directed by the person who had the possession and power to direct the voyage to *Great Britain*; and the commissioners were appointed to receive the ships and cargoes, and to manage and dispose of them upon their arrival. What is the effect of the most solemn appointment of a consignee different from this? What greater interest, or closer connection with the ship does he acquire? If then there be no difference, no one ever questioned that a consignee or agent of the description spoken of, might make an insurance for the benefit of the owner and person entitled, and for whom he as consignee is authorized to act. But the interest of the commissioners is objected to on account of its contingency: that it depended upon the continuance of his majesty's intention, and that if the king had thought proper to restore these ships to the *Dutch* owners, or to alter their destinations, the authority of the commissioners would never have attached. But a vested interest is not necessary to give the right of insuring. The commissioners had a contingent interest; and supposing the intentions of the crown to remain unaltered, nothing stood between them and the vesting of that contignent interest but the perils insured against. It is stated that they cannot be entitled to an indemnity: for they had nothing to lose. But in fact they lost by the perils of the sea what but for those perils would have vested in them absolutely. At the time both of the insurance and the loss, their title, like that of a consignee, was inchoate: occupancy was necessary to perfect it. It is true that their interest was revocable. But so is that of a consignee. The owner

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may at any time appoint another consignee or agent; he may change his intention in the course of the voyage. It is very common to direct the captain to touch at particular ports for new instructions. The powers of a consignee therefore are not more permanent than those of the commissioners. Many instances also may be put of contingent consignments; as a consignment to *A.*, at *London*, if the ship loses her market at *Calais*; or to *A.*, if living when the goods arrive, and if not, to *B.*; or to *A.* upon condition that he accept certain bills; in all these cases, and many others, as if the consignee became insolvent, and the goods are not paid for or the importation be prohibited by the Government of the country; the interest may be prevented from vesting by other events than the perils insured against, and yet this possibility of countermand will not prevent the consignee from insuring. Where there is an expectancy coupled with a present existing title, there is an insurable interest. It is argued that the title of the commissioners was contingent, because the ships which were the subject of their authority might never arrive. But although it was matter of contingency whether any ships would arrive upon which this right could operate, the right itself was not contingent. Antecedent to the arrival of any ships, the commissioners were invested with a right to take into their possession all ships of the description mentioned in the act of parliament which should arrive: and it might as well be insisted that the power of justices of the peace, or of the judges of assize, who act under a commission from the crown, was contingent, because no felony might be committed which could be the subject of their jurisdiction. The interest of the commissioners was very different from that of a prize agent, where the title to his profits arises from meritorious services to be performed at the end of the voyage; and from that of the next of kin of a lunatic, who at the end of the voyage would

1806.

LUCENA v. CRAUFURD and Others, in Error.

would have no interest whatever, and who eventually may never have any interest, because the lunatic may survive him. Inchoate rights founded on subsisting titles, unless prohibited by positive laws, are insurable. Freight, respondentia, and bottomry, are of this description; the profit is prospective, but they are founded on existing charter-parties, bonds or agreements: Wages of seamen are in their nature insurable, though universally prohibited to be insured on principles of policy. The case of *Le Cras* v. *Hughes* was a case of mere expectation, and the circumstances were not near so strong in favour of the assured as the circumstances of this case. The doctrine there laid down by that great expositor of marine law Lord *Mansfield*, twenty-four years ago, has been recognized as law in subsequent cases; and if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds. The interest of the captain in *Le Cras* v. *Hughes* was not certain; yet it was all but certain, that the property would be given according to the custom of the crown in such cases: Captain *Luttrell* had an interest for which he would not have taken 20,000l.; and it would be a strange thing that he should not be allowed to insure that interest against the perils of the sea. There is a decision of a foreign court of prize very nearly corresponding with *Le Cras* v. *Hughes*, in 2 *Valin. article* 15. *fo.* 57. By the *French* ordinance future profits were prohibited to be insured. The author, in commenting on the article, says, "It is not a future profit to insure a prize already taken, although the prize be not acquired with certainty until it be brought within the ports of the realm;" and then cites an adjudication by the parliament of *Aix*. At common law a possibility may be transferred, and devised; and if

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so, why may it not be insured? The commissioners might have sold these ships while at sea, subject to the contingency; and it would then be most extraordinary if they could not insure them. Suppose that power had been given to the commissioners to sell the ships upon their arrival for their own benefit, subject to the right of the crown to restore them or alter their destination. Could it then be contended that the commissioners would have no interest, or that they would not be damnified by their loss at sea? Yet whatever interest they would have had for themselves in that case, they had in this as trustees for others. The ancient definitions of insurance do not exclude contingent interest. The definition in *Valin, sur article* 1 *mo. fo.* 26. is, *Assecuratio est conventio de rebus tuto aliunde transferendis pro certo præmio, seu est aversio periculi.* In *Loccen. lib.* 2. *c.* 5. note, *Aversio periculi, ita dicta quod alterius periculum in mari aversum it; aut in se recipit.* In *Roccus, Assecuratio est contractus quo quis alienæ rei periculum in se suscipit obligando se sub certo pretio ad eam compensandam si illo perierit. Ideo valet pactum ut si merces salvæ venierint in portum solvatur certa summa, si vero illæ perierint teneatur assecurator solvere damnum vel æstimationem istarum mercium.* These definitions clearly embrace a contingent interest, which is subject to the perils of the sea, and for the loss of which a compensation may be made. All that these definitions require is that the insured shall be interested in the arrival of the thing insured, and the event of the voyage at the time of effecting the policy and at the time of the loss. Nor is it any objection to this insurance that other persons might have insured to the full value. Where a ship and cargo are insured to the full value, and money lent on bottomry or respondentia, the lender may insure as well as the owner of the ship and cargo. It has been expressly decided that a creditor may insure the life of his debtor; for though he has no right depending upon the life of his debtor,

1806.

LUCENA v. CRAUFURD and Others, in Error.

debtor, he might be essentially injured by his death. With respect to the statute of the 19 *Geo.* 2. (*a*), it was clearly established as law among all the commercial nations of *Europe* that the insured must have an interest in the thing insured; and could not recover without proving that loss: and herein the marine law differed from the common law of *England*, which sanctioned an action on a wager without any interest in the parties but what was created by the wager itself. But as this law was introduced in favour of the insurers, and to prevent deceitful and unlawful gaming, the parties by stipulations inserted expressly for that purpose in the policy, might wave the proof of interest on the principle, that *quisque potest renunciare juri pro se introducto*: and this was usually done in the manner expressed in the statute; and this principle was recognized in an appeal from *Scotland*, determined in the House of Lords during the last session. As to the case of *Goddart* v. *Garrett*, 2 *Vern.* 269. in which the Court declares the law to be settled that if a man has no interest and insures, the insurance is void, although it be expressed in the policy interest or no interest; it may be observed that this decision was made in the year 1692; and that before the 19 *Geo.* 2. different determinations had been made on the subject of such policies, the history of which is given by Lord *Hardwicke* in *The Sadlers' Company* v. *Badcock*, 2 *Atk.* 556. in a decree that he made in 1743, which was only three years before the making of the statute. His lordship says that such insurances began in the *Spanish* trade, and were called fraudulent insurances as early as when he first sat in the King's Bench. The fraud probably consisted in this, that under the mask of insuring interest or no interest, ships and their cargoes were insured for above their real value, and then fraudulently destroyed. It

(*a*) The following observations relative to the 19 *Geo.* 2., were made by Mr. Justice *Heath*:

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has been said that to sustain policies of such a nature as the present, would be to depart from the wise and salutary provisions of the statute 19 *Geo.* 2., and to introduce a mischievous species of gaming: but this is a gratutious assertion. It is impossible to elude that statute. The question always is, Whether the policy be a gaming contract? if it be no artifice how can it elude the force of the statute? The case of *Le Cras* v. *Hughes* was infinitely more likely to introduce an abuse of the statute than the present case. That has been decided above 20 years; yet what ill consequences have followed? The same may be said of valued policies. In the case of wagering policies, any number of persons may make insurances on the same ship. But that is not the case here. If the commissioners could not insure this property, the *Dutch* owners could not; and it would be a strange paradox to assert, that these are ships and cargoes subject to all the perils of the sea in their voyage, and yet none are competent to insure them. Though it may be admitted that the commissioners had no *scintilla* of right in possession or reversion; yet they had a contingent interest founded on the statute, the commission and the seizure. It was their duty by all lawful means to provide for the preservation of the property till they should have an opportunity to take possession of it, and insurance was a proper mean for that purpose. The consequence is that the commissioners had a right to insure. With respect to the *Zeelelye*, the above observations put that ship upon the same footing with the rest. But it may further be observed, that at the time when the *Zeelelye* was lost she was detained under the original orders of seizure; for the captors knew nothing of hostilities having commenced. It is contended however that the proceedings of the Admiralty will make this ship a prize from the time of the seizure by relation. It is true that for certain purposes when a sentence of condemnation takes place

1806.

LUCENA v. CRAUFURD and Others, in Error.

place the property is changed from the time of the capture. But does it follow that the validity of this insurance is to be affected by relation? Before the property in the *Zeelelye* could be changed by any proceeding in the Admiralty she was gone to the bottom: and while she was in existence she was never detained under any other orders than those which were the foundation of the act of parliament and commission. The commissioners therefore had such an interest in this ship as enabled them to effect a valid insurance.

THOMPSON B. agreed in the above opinion with respect to all the ships except the *Zeelelye*; as to which he was of opinion that the commissioners were not interested in that ship at the time of the loss, which did not happen till after the proclamation for reprisals.

CHAMBRE J. and LAWRENCE J. answered in the ne-

CHAMBRE J. To constitute an interest, such as that which in the declaration is averred to be vested in the Plaintiffs as commissioners under the act, I presume it must be necessary to shew that the ships and goods at the time of the sailing, or at least before or at the times of the losses, had become the objects of the Plaintiff's commission. If they were not the objects of their commission, I have no conception in what way they could have an interest in them as commissioners. The duties of their office were confined to *Dutch* property that was actually in the kingdom, and provisionally detained there under the king's authority. No matter who brings it in. They have nothing to do as commissioners with consignments from abroad, nor was any consignment in fact made to them. They have been called statutable consignees. If that phrase means any thing, it must mean that the statute

tute had consigned these particular ships to the commissioners; but look at the statute, and we find nothing more than that it authorizes a commission under which whatever property of a certain description arrives, it will, if they continue commissioners, fall within their care and management officially to prevent its perishing. But the act had in no respect attached upon this property; it had only created a capacity in the Plaintiffs in certain events to receive these or any other *Dutch* ships or merchandizes. The intention of the Crown was that it should come to *England:* true, but that created no contract with the Plaintiffs. It was a general intention applicable to all *Dutch* ships that were seized or might be seized. The destination of the property was alterable at any time, at the pleasure of his majesty. The Crown might have given it up to the owners. The property might be changed by the commencement of hostilities. It is no answer to say that a defeasible interest would be sufficient, for there an interest exists till it is defeated. A consignment is a species of mercantile conveyance operating upon the particular effects consigned, which though it may be defeasible, may operate in the mean time, and enable the consignee by his acts to bind the consignor. The statute creates neither trust or agency in them before arrival; they are not authorized to give any directions to those who have the ships, &c. in their charge at sea, or to maintain any action in the names of themselves or any others, for any wrong or injury the effects may receive. In short, there is no other foundation for the claim of interest than a mere naked expectation of acquiring a trust or charge respecting the property without a *scintillia* of present right either absolute or contingent, in possession, reversion, or expectancy, in the proper legal sense of the word. If this kind of expectancy which the commissioners had would be sufficient, what was there to hinder the commissioners from insuring every ship belonging

1806.

LUCENA v. CRAUFURD: and Others, in Error.

ing to the Provinces that were out at sea, or in any other situation of insurable risk. The *British* ships were to seize them if they could. If they succeeded they would endeavour to bring them to *England*, and when brought there, in the then state of things, they would fall under the management of the commissioners. That would only be adding one more chance to the many that intervened in the present case between the Plaintiff's possession and the subject insured, for it is by no means true that nothing intervened but the perils insured against in the present case.

LAWRENCE J. It is first to be considered what that interest is, the protection of which is the proper object of a policy of assurance. . And this is to be collected from considering what is the nature of such contract. The definition of an insurance given by *Grotius* in the 2d book of his Introduction to the Jurisprudence of *Holland*, part 24., as cited in *Loccenius* 175. is, that *Assecuratio est conventio seu contractus quo quis in se suscipit incertum periculum cui alter est obnoxius qui e contrario eo nomine illi præmium retribuere tenetur.* *Pothier* in his treatise on Contracts of Chance or Hazard, in his general definition of insurance states it to be a contract by which one of the contracting parties charges himself with the risk of the fortuitous accidents to which something is exposed, and obliges himself *to indemnify* the other from the loss which those accidents may occasion in case of their happening, in consideration of a sum of money which the other contracting party gives as the price of the risk with which he is charged. (*Traités des Contracts Aleatoires*, sec. 2.); and Mr. Justice *Blackstone* in his Commentaries (v. 2. 458.) states it to be a contract between *A.* and *B.* upon *A.*'s paying a premium equilavent to the hazard, *B.* will *indemnify* or secure him against a *particular event*. These definitions by writers of different countries are in effect the

the same, and amount to this, that insurance is a contract by which the one party in consideration of a price paid to him adequate to the risk becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in anywise be of disadvantage to them; not only those persons to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those also who in consequence of such events may have intercepted from them the advantage or profit which but for such events they would acquire according to the ordinary and probable course of things. In the case of the loss of property it is obvious that the owner is prejudiced, and that therefore it is of importance to him, and he is concerned to avert the damage that it may be exposed to; in other cases there may be some difficulty in shewing if the event had not happened, that those advantages would have arisen, against the interception of which by sea risks the assured means to be indemnified, but that difficulty when the nature of the contract is considered abstractedly does not prove that it must be confined to matters of property, where from the variety of probable contingencies (which independant of the specified risks may prevent the assured from deriving any benefit from the subject matter insured) it is impossible to weigh the probability of its being intercepted by such risks; an interest so uncertain may not be the subject of insurance. And so Lord C. J. *Willes*, in *Fitzgerald* v. *Pole*, *Willes* 648. considered it; where to shew that in that case the insurance must be on the ship and not on the voyage, he relied on the impossibility of such contingency as the loss of the voyage being valued; so that according to him the impossibility of valuing, and not the

1806.

LUCENA v. CRAUFURD and Others, in Error.

want of property, was the reason why that voyage could not be the subject matter of this contract. That a man must somehow or other be interested in the preservation of the subject matter exposed to perils, follows from the nature of this contract, when not used as a mode of wager, but as applicable to the purposes for which it was originally introduced; but to confine it to the protection of the interest which arises out of property, is adding a restriction to the contract which does not arise out of its nature. According to *Scaccia* (*Quæstio prima*, No.153.) *Assecurationis contractus habet locum in quâvis re, seu de quâvis re quæ subjacere possit periculo seu interitui.* A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; *in quantum mea interfuit, i. e. quantum mihi abest quantum que lucrari potui. Dig. lib.* 46. *lib.* 8. *c.* 13. And whom it importeth, that its condition as to safety or other quality should continue: interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring: and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its desruction. The property of a thing and the interest devisable from it may be very different: of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended.

1806.

LUCENA v. CRAUFURD and Others, in Error.

prehended. The objection to insuring that in which the assured has no property seems to me to rest not so much on a want of interest as on this, that if the interest intended to be protected by the assurance is liable to be affected by other matters than the perils insured against, of which matters some might happen in the interval between the time of the loss and the probable time when the risk would have ceased had no loss happened, it may be impossible to refer to those perils the prejudice or damage against which the insured meant to protect himself with such degree of certainty as to enable the assured to establish his claim to a compensation on the ground of his loss having clearly arisen from the perils insured against. This objection I conceive might have been made in the case of *Grant* v. *Parkinson*, though in that case the profits insured were ascertained by contract; for if the army had been marched from *Quebec* before the ship could have arrived, there would have been no army to supply, by which the profits were to have been made, and in such case, notwithstanding the loss of the molasses by the perils of the sea, the Plaintiffs' profits would not have been defeated by them; but the event did not happen before the probable time of the ship's arrival, and was by no means likely to happen. And the Court or King's Bench, Lord *Mansfield* being then at the head of it, assisted by some of the ablest men who ever practiced in *Westminster-hall*, held such interest insurable. And it seems that this objection, if valid, would hold to all insurances where there is a possibility of the interest of the parties being defeated by other means than the ordinary perils insured against; *e. g.* it might be urged against insuring fish or fruit, because they might both perish by becoming putrid or rotten, between the time of the loss and arrival, if a loss had not happened. On these grounds it seems to me that the contract of marine insurance may extend to protect every kind of interest that may subsist

1806.

LUCENA v. CRAUFURD and Others in Error.

in or be dependant upon things exposed to the dangers to which maritime adventures are subjected; and I am not aware that by the laws of this country it has been reduced within narrower limits, though several statutes have been enacted to prevent its being made a colour for gaming. The 43 *Eliz. c.* 12. which erected a Court for determining causes arising on policies of insurance, has indeed adverted only " to the usage of the merchants both of this realm and of foreign nations, when they make any great adventure, to give some consideration of money to other persons to have from them assurance made of their goods, merchandizes, ships and things adventured, which course of dealing is commonly called a policy of assurance." But this statute has not limited the contract in this country to such assurances, nor is it to be collected from any thing in the statutes that the framers of it supposed the contract of insurance to be of so confined a nature, for the recital speaks of the usage as obtaining among merchants both of this realm and of foreign nations, and that the usage of effecting policies of assurance among foreign nations on other subjects than those enumerated in the 12th of *Eliz.* will appear from various writers of those nations. And the 13th & 14th *Cha.* 2. *c.* 23. intituled, " An additional act concerning matter of assurance used among merchants," in its recital mentions a want of power in the commissioners to make any order against the ship or goods which commonly are the things assured, evidently implying that other matters might be insured. Conceiving for these reasons that the contract of marine assurance is not from its nature confined to protect the interest arising from the ownership of the subject exposed to the risk insured against, I shall proceed to consider whether the Defendants in error, as such commissioners, could under the circumstances of this case suffer any prejudice or damage by the loss of the ships and goods described in this policy of insurance, so

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as to entitle them to recover, as having an interest within the meaning of this policy. From which consideration I would exclude all interest from their title to recompence or profit from their services to be performed, which is the subject of another question. In order to decide this we must look at their commission to see what authority they had, and what duties were imposed upon them, and if it shall appear from it that the purpose and object of their commission was only to take care of the *Dutch* property after its arrival in *England*, and if till then they had not any power to interfere with it, they cannot be said at the time of the sailing insurance and loss to have been interested; for until the time should arrive when their authority and duty as such commissioners would attach, they would have no existing concern in such property, and could not in their character as commissioners suffer any prejudice or damage by a loss happening before they had any concern in the thing assured. Now the commission granted to the Defendants in error, in pursuance of 35 *Geo.* 3. *c.* 80. authorized them to take into their possession and care only such ships and merchandizes as his majesty by virtue of that act could authorize them to take possession of, so that by the letter of their commission referring to the statute, their care was confined to the ships which had been detained, or might be brought into the ports of this kingdom, and until arrival no property belonging to the subjects of the United States was clothed with those circumstances which designated it to be the object of their commission, and made it the duty of the commissioners to interfere in its preservation. The course of the argument at the bar has not, I think, tended to shew that such was their duty; but to establish this proposition that as the insurance by them was as commissioners, it was not a wager, nor for their benefit as individuals, but a contract of indemnity for the benefit and protection of those who might be ulti-

1806.

LUCENA v. CRAUFURD. and Others, in Error.

mately beneficially entitled to the property of the subject matter insured, if it were brought into this kingdom, and that it is in effect the same thing as if it had been so declared. Probably an insurance with such a declaration would have been good, but of that it will not be necessary to say any thing, inasmuch as I conceive (if it was not the duty of the Defendants in error, as such commissioners, to insure for the benefit of such persons) that the averment made use of in these pleadings will not bear that construction; whether it will or not must depend on the relation they had as commissioners to the subject insured at the time of the insurance. Had they been authorized generally to take care of ships detained by His Majesty's orders, by the act of detainer the ships would have become objects of their concern, and from thence a duty might possibly have been inferred to take all proper steps to prevent any damage from their loss, and an averment that the Defendants in error insured as such commissioners might have borne the meaning which has been contended for, but that cannot be understood in this case, for the averment in effect refers their interest to the act of parliament and their commission, the terms of which respect only the case of ships and goods detained and brought into the ports of this kingdom; and I know not how to conceive an interest dependant on a thing, with which thing the persons supposed to be interested have nothing to do. The Defendants in error have been considered as trustees or consignees, who it is said have insurable interest. But I do not think they can be considered as trustees, or as consignees, having such interest as will support this averment. A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured for the benefit of another; but the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be consi-

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dered as consignees in whom any interest or right is vested by bill of lading or other instrument of consignment by which the property of the subject matter of the consignment *primâ facie* will pass. If they be consignees, they were naked consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees, according to the common understanding of that word; and taking them to be naked consignees who have not the legal property of the subject matter of the insurance, and who are not beneficially interested in it, they ought I conceive to have averred the interest to be in those on whose account the insurance was made, whether they were certain defined persons or uncertain persons, and not in themselves as commissioners: for taking the meaning of the word *interest* to be what I have stated it to be, it is obvious that a naked consignee who means that the insurance should be applied to the protection of the things insured, and the indemnification of him who suffers by losing the value of those things, his object being not to secure himself from some damage consequential to the loss as his commission, but that others interested as proprietors should be indemnified: it is obvious, I say, that such consignee can himself suffer no prejudice by the total or partial destruction of a thing which forms no part of his property. In the safety of such thing such naked consignee can in this view have no interest. The persons prejudiced by the loss of property are his consignors, or those for whose benefit the property is to be disposed, and in them only in such case and in such light is there an interest. When such consignee insures to protect the interest which property gives, the interest should be averred, (*vid.* 1 *Bos. & Pul.* 323.) either directly or in terms tantamount to be in those who are or may be beneficially entitled; for in such case interest means property, and the property must be shewn to be in him in whom the interest is averred to be.

1806.

LUCENA v. CRAUFURD and Others, in Error.

To the sixth question GRAHAM B., LE BLANC J., LAWRENCE J., ROOKE J., GROSE J., THOMPSON B., HEATH J. MACDONALD Ch. B., and Sir JAMES MANSFIELD Ch. J. answered, first, that the averment touching the right of the commissioners to take possession of the ships and goods upon their arrival in *Great Britain* was unnecessary, and might be rejected as surplusage; that is was only introduced to shew an interest in the Plaintiffs; and as it would have been sufficient to aver an interest without shewing how it arose, and the averment in question was unconnected with the averment of interest, the latter might be proved in any way without regard to the establishment by evidence of the former; they referred to *Pippin* v. *Solomons*, 5 *Term Rep.* 496. Secondly, as to the averment of interest, that whether the Plaintiffs were bound to aver an interest or not, yet that having averred that the contract of assurance was made to protect an interest, it was not competent to them to desert that averment, and to recover, as if the contract had a different object. Thirdly, that the statute of the 19 *Geo.* 2. had not rendered any averment necessary which was not necessary before the passing of that act, the object of which was to prevent gaming, by prohibiting the insertion of certain clauses in the policy, which dispensed with proof of interest; that the statute therefore related only to the proof, and not to the form of pleading; that before the passing of that statute it had been most usual to make an averment of interest, or to state what was equivalent to it, but that there were precedents of considerable authority to shew that such an averment was not necessary, which are collected in *Crawford* v. *Hunter*, 8 *T. Rep.* 13. and *Nantes* v. *Thompson*, 2 *East*, 385., and from which it appears that such an averment is not essential to maintain a declaration on a policy of insurance; but that notwithstanding such averment was not necessary to be inserted in the declaration, yet both before and since the statute

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indemnity was to be considered as the object of a policy insurance, being a contract to protect the insured from the consequences of certain events which might affect the property insured; and that it was therefore necessary to shew that a real fair *bonâ fide* loss had been sus tained.

CHAMBRE J. Beyond all question a policy of insurance is a contract of indemnity; and this is an insurance on a real existing interest in the property insured; and therefore it was incumbent on the Plaintiffs to state in the first place in their declaration, and afterwards to make out in evidence, a substantial interest. They have declared as for an average loss; and if they can recover at all, it must be only according to the interest they have, according to the loss they have sustained. Their case is, that as such commissioners they have sustained a loss; and in proportion to that loss they claim an indemnity. I do not know that any particular sort of averment is necessary in a declaration, but it must be apparent from the facts stated in the declaration itself that there is an interest. It need not be called an interest, but in every case there must appear on the record a *prima facie* ground of action, and in order that an action brought on a policy of insurance may be supported, it must appear on the face of the declaration that the party some way or other had an interest. Now I take it that one of these averments must be made out; perhaps both need not. If the Plaintiffs had alleged simply that they had this interest in this property, that would have done without the averment, that if it had arrived in the ports of this country it would have fallen under their care as commissioners under the act. But if the averment of interest is not made out in proof, it cannot be rejected as surplusage; for if you strike it out of the declaration there is no foundation for the action. With regard to the last part

1806.

LUCENA v. CRAUFURD and Others, in Error.

part of the question, whether after passing the 19 *Geo.* 2. *c.* 37. it was necessary in the law in a declaration in an action brought on a policy of insurance effected on a *British* ship for the plaintiff in such an action to make any averment touching his interest therein which was not necessary to be made in such declaration previous to the passing that act of parliament, the statute certainly introduces no form of averment; it takes away a clause that was frequently inserted in policies of insurance, but it introduces no new form of averment. It was made with an intention to prohibit gaming and wagering policies, and policies containing these words, "Interest or no interest," or "without further proof of interest than the policy." The statute, however, seems to require that there should be some averment. An averment might be made in the manner I have stated. The answer then which I give to this question is, either that some fact should appear on the face of the declaration to shew an interest, or there should be an express averment of interest. Whether this was necessary before the statute seems to be doubtful. According to some precedents it should seem that the averment of interest was considered as unnecessary; but if these precedents may be supposed to be erroneous, I should say that even before the statute there must have been an averment of some kind or other, from which it must appear that such an interest existed.

To the seventh question GRAHAM B., LE BLANC J., LAWRENCE J., ROOKE J., GROSE J., THOMPSON, B., HEATH J., MACDONALD Ch. B., and Sir JAMES MANSFIELD Ch. J. answered, that the want of power to abandon was not a certain criterion of insurable interest; that in many cases there might be insurable interest without power to abandon, as in the case of freight, bottomry, and respondentia; and that the 19 *Geo.* 2., which prohibited insurances without benefit of salvage, was not to be

be understood as prohibiting the insurance of things, not capable of salvage, but only as prohibiting the insertion of a clause to that effect in a policy upon things which were capable of salvage. They all thought that the commissioners might have abandoned these ships and goods if they had arrived in a *British* port in such a state as to justify abandonment; and most of them thought that they might have abandoned as agents or consignees of those who should ultimately be entitled, even if the ships did not arrive.

LE BLANC J., who agreed in the latter opinion, said, Where the subject-matter of insurance is such as not to be capable of being abandoned, there the incapacity to abandon will not affect the validity of the insurance; or in other words, an incapacity of the person to make an abandonment may, but an incapacity of the thing to be abandoned cannot affect the validity of the insurance.

Sir JAMES MANSFIELD Ch. J. said, The incapacity to abandon, as I apprehend, will have no other effect than this; that the person who cannot abandon can never recover for a total loss. While any thing remains of the things insured, he may take that and make the most of it; he can only recover for a partial loss.

CHAMBRE J. From the opinion I entertain on the other questions, I cannot give any other answer to this than by saying, that in my humble opinion the Plaintiffs had not any such interest in the bodies of these ships, or in the goods, or any part of them, as was capable of any abandonment. I think they were quite strangers. My answer, therefore, is in the negative, that they had not any such interest as was capable of being abandoned. This policy of insurance is on such a species of property as is in its own nature capable of abandonment, and to be sure it is a pretty good test to try the interest of the party

1806.

LUCENA v. CRAUFURD and Others, in Error.

party by examining whether they were so connected with the property that they could have abandoned it, or whether they could not. I do not mean whether those for whom they acted, for whom they were agents consignees, or trustees, could abandon; but whether the commissioners could; and I think they could not. I am likewise of opinion that an incapacity on their part to abandon rendered the policy in question invalid.

LAWRENCE J. The doctrine of abandonment being founded on this ground, *viz.* that no person shall be paid as for a total loss and retain any interest in the thing insured by which he may receive more than an indemnity, an incapacity to abandon in cases where the subject-matter is capable of abandonment operates as a medium to shew a want of interest in the subject of the insurance at the time of the loss. And if the commissioners had not a capacity to abandon the subject of the insurance, it will affect the validity of it, as shewing they had no interest. And that they had no interest in the subject-matter of the insurance I have endeavoured to establish in my answer to the fifth question. But if the averment in the declaration of the interest of the Plaintiffs as commissioners can be understood as an averment that the insurance was made for the benefit of those who might be ultimately entitled to the things insured, the incapacity in the Plaintiffs to abandon would only prevent a recovery for a total loss, where any thing had been or might be saved, until they were enabled by those for whom the insurance was made to convey to the underwriters the benefit of such salvage.

To the eighth question; first, the great majority of the learned Judges declared their opinion, that the profits of the commissioners were insurable; they said the commissioners were materially concerned in the safe arrival of the

the ships, because their profits depended upon it, and they would therefore sustain a loss if the ships did not arrive; that if the commissioners had a moral certainty of deriving the profit, that was an insurable interest; that the commissioners had such a moral certainty, it being contrary to the usage of the crown to remove commissioners when once appointed, except for some misconduct, which was not to be intended; and that they had an existing right to future management. They referred to *Grant* v. *Parkinson* (*a*), *Le Cras* v. *Hughes* (*b*) and *Henrickson* v. *Margetson* (*c*), before Lord *Mansfield* in 1776, where his lordship held that imaginary profits on a cargo of indigo were insurable; and his opinion was confirmed on a motion for a new trial; to *Craufurd* v. *Hunter* (*d*), *Flint* v. *Le Mesurier* (*e*), and *Wolfe* v. *Horncastle* (*f*), where *Buller* J. held that a creditor who had advanced money which would have been a lien on a cargo if it had arrived might insure; also to *Barclay* v. *Cousins* (*g*); and they observed that the possibility of the interest being defeated by other events than the perils insured against, such as a countermand by the consignee, was not considered as affecting the right of insurance in those cases; and they put the instance of an insurance of profits upon a perishable cargo, which might become of no value independantly of sea risk.

LAWRENCE J. agreed in the above opinion respecting the right to insure profits; but said that the commissioners in the present case never could have insured if the policy had been effected on their profits, as none of the ships arrived till some time in the year following the declaration of hostilities, and the others, which were lost before the declaration, were lost at a time and at a dis-

(*a*) *Park. M. I.* 267.
(*b*) *Park. M. I.* 269.
(*c*) *Park. M. I.* Ed. ult.
(*d*) 8 *Term Rep.* 13.
(*e*) *Park. M. I.* 268. n. (*a*)
(*f*) 1 *Bos. & Pull.* 316.
(*g*) 2 *East*, 544.

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1806.

LUCENA v. CRAUFURD and Others, in Error.

tance which made it impossible for them to have arrived before such declaration; and that if they could have had no profit as commissioners on the ships' arrival they could suffer no damage by the loss; for whatever took away the damnification in the whole or in part must operate upon the indemnity in the same degree.

None of the learned Judges denied that the profits were insurable.

Secondly, with respect to the 19 *Geo.* 2. GRAHAM B. and ROOKE J. thought that an insurance on profits did not fall within the provisions of that statute.

CHAMBRE J., LE BLANC J., MACDONALD Ch. B., and Sir JAMES MANSFIELD Ch. J. inclined to think that such an insurance was within the provisions of that statute: they observed that the point arose in *Grant* v. *Parkinson*, but was not determined, the Court being of opinion that the words in dispute, *viz.* "profits valued at 1000*l.* without other voucher than this policy," only made it a valued policy, and did not amount to a dispensation from proving interest. They observed that though the subject of insurance was profit, yet that the risk was in fact incurred by ships or goods, upon which the profit was dependent and the preservation or destruction of which occasioned the profit or loss; and that an insurance upon the profits of any ship or goods by way of wager, would be a mere evasion of the statute, and though not within the words must be taken to be within the spirit.

LAWRENCE J. said, If the question had respected a recompence for services to be performed in regard to the ships of His Majesty or his subjects, or goods laden on board the same, in order to advance the remedy intended to prevent the mischiefs recited in the act, it probably would be held that no insurance can be made on matters connected

connected with the ships of His Majesty, or his subjects, and the merchandizes, goods, or effects laden on board them against any events affecting the same by way of gaming or wagering. But it is not necessary to deliver any opinion on that point; for as it has been decided that this statute does not extend to foreign ships, it will follow from such construction of the act, that policies on matters connected with foreign ships are not within it, and that the insurance of the commission of the Defendants in error to arise from the care, management, and disposition of the ships in question, and of the goods laden on board the same, they not being the ships of His Majesty or his subjects, is not an insurance within the 19 *Geo.* 2.

The other learned Judges did not deliver any precise opinion on this part of the question.

Thirdly. The learned Judges were unanimously of opinion that the policy in question could not be considered as a policy upon profits, having been expressly declared upon as a policy upon the Plaintiffs' interest in the ships and goods themselves; and that if it had been intended as a policy on profits it should have been so stated.

After the learned Judges had delivered their opinions, the further consideration of the subject was adjourned to the 10th *July*, on which day

Lord ELDON spoke to the following effect: Before I state the first count in the declaration in this case, it will be extremely material to call your lordships' attention to the counts upon which the jury have found for the Defendant. For whatever might have been the opinion of any of your lordships, if the subject-matter of those counts had been brought before the House by the bill of exceptions, all further consideration of the matters of law and fact arising on those counts is excluded

1806.

LUCENA v. CRAUFURD and Others, in Error.

excluded by the form of proceedings, unless some means can be found of giving the parties an opportunity to lay the matters stated in those counts again before a jury. The second count states the interest of the property insured to be in His Majesty, and avers that the policy was made on His Majesty's account, and that the commissioners had given directions to the agents to negotiate policies on his account. But as the jury have found for the Defendant on this count, it is not open to us to say that His Majesty had any interest in the property, or that the commissioners insured on his account, except so far as those circumstances arise out of the first count. The third count avers that the property, at the time of the insurance and loss, belonged to foreigners. The object of this count was to dispense with the averment of interest; for if the property belonged to foreigners the insured might recover, although he had not an interest. But the jury having also found for the Defendant on this count, it cannot now be said that these were ships on which an averment of interest is unnecessary. Upon all the common counts the jury have also found for the Defendant. The question, therefore, upon this bill of exceptions is reduced to this, Whether the Plaintiffs have supported their demand upon the first count, and to the extent in which they have recovered, as to each and every of the ships mentioned in the declaration. (His lordship then stated the first count.) The effect of the averment of interest in this count, as it seems to me, is, that the commissioners had a right and an interest, as such commissioners, to make an insurance for their use, benefit and account as such commissioners, at the time when the ships were at *St. Helena*, when they sailed from thence, and till the time of the losses. And the averment is not only predicated of all the ships, but of each of them at each of the times mentioned in this part of the declaration. It is averred that the ships sailed from *St. Helena* upon the 2d of *July* 1795 for *London*; that the

the *Houghly*, with part of her cargo, was lost by perils of the sea on the 1st of *September* 1795; and the *Surcheance* and her cargo on the 5th of *September*; that the *Dordrecht* was disabled on the 18th, but was carried into *Ireland* and sold there, and her cargo brought to *London*; and that the *Zeelelye* was lost on the 26th of *September*, which was after the declaration of hostilities between this country and the *United Provinces*, which took place on the 15th of *September*, and which stamped the character of enemies' property upon the *Zeelelye* from the date of that declaration. As I understand the case, the verdict has been taken for damages, computed upon the principle that the commissioners had a right to recover in respect of all these ships and their cargoes, and not merely upon some of them. If therefore it should turn out that they have only a right to recover upon some, and that it should appear upon the record that they have recovered upon all, there will be a miscarriage in the course of justice. (His lordship then stated the bill of exceptions.) The questions now are, first, Whether upon the matters disclosed on the first count the commissioners had an insurable interest in any of the ships and cargoes upon which they have recovered? Secondly, If they had an insurable interest in any, whether there are not some on which they had no such right? Whether your lordships shall come to the conclusion that they have no right to recover upon any of these ships and cargoes, or to a more limited conclusion, and take such steps as may be in your power to collect the true result of the proceedings which have been had, it seems to me due to the importance of the subject to enter into some of the topics which have been discussed at the bar; and to determine the real character of the Plaintiffs which led to the existence of their commission. The orders of Council, referred to in the bill of exceptions, applied to a state of this country with relation to the *United Provinces* and their inhabitants

1806.

LUCENA v. CRAUFURD and Others, in Error.

bitants which I may represent as perfectly unparalleled. The *United Provinces* had been reduced under the yoke of *France*, then at open war with this country; whether finally reduced or not was the question. The former Government and a great part of its subjects were adverse to *France*, and attached to this country; many of the inhabitants had proposed to resort to this country for protection, and some had come here with their property. It was thought an humane policy not only to protect the individuals, but to bring into the ports of this country *Dutch* property bound to *Holland*, for the benefit of those who might ultimately turn out to be entitled. On the other hand, in case a war should take place, the property of the *United Provinces* and of its inhabitants would become the property of the crown, and subject to be disposed of by His Majesty. Yet even in that event it appears to me to have been taken for granted that many *Dutchmen* might acquire a friendly character, and be entitled to be considered as owners of the property taken, and to whom therefore it would have become liable to have been restored. It was impossible, however, to make a provision of this sort in the exercise of His Majesty's prerogative, since such ships and cargoes could not enter *British* ports consistently with law. The power of the Legislature therefore was called in; but it may be observed, that so far as related to detaining *Dutch* ships and cargoes at sea, by the force of the state the prerogative of the Crown was fully sufficient, and the act appears to have been studiously framed to avoid any interference with that prerogative. Accordingly, the power of the commissioners is expressly limited to ships and goods that have actually come, or been brought into the ports of *Great Britain*. All the directions relative to bringing these ships into port were given in the legitimate exercise of the king's prerogative for the protection of the state and its allies; and it appears to me, as it has done to the learned

learned Judges unanimously, that there is nothing in this act of parliament which touches the prerogative while the ships and cargoes were at sea, or even in the ports of *Ireland;* and that it was competent to the Crown from the moment they were taken possession of to restore them to the *Dutch* owners or the *Dutch* government, or to deal with them in any manner which should be thought fit; for the power of the commissioners never attached till they actually came into a *British* port. If this be the law, it is a direct negative of that which the averment seems in a general sense to import, and those averments can only be true in this sense, that the commissioners had a power to dispose of the ships and cargoes if they happened to come into port, and His Majesty's orders did not intervene to prevent their being brought in, or hostilities did not intervene to prevent their being brought in, or to change the characters of the owners. For it appears to me, that even though the ships and cargoes were taken possession of by the commissioners, the act was not intended to operate upon them if hostilities should take place. With respect to those brought in after hostilities, they would be ships in the hands of the king's officers, to be condemned as seized by the force of the state, and distributed according to His Majesty's bounty. It could not be the intention of the act to affect the rights of the Crown. It has indeed been stated by one of the learned Judges, that these commissioners might have sold the ships. With great deference to the authority of that learned Judge I must state to your Lordships my humble but confident opinion, that they could not have sold them; and I go much further; the commissioners could not have made a good title, even if they had been brought into an *English* port. Among the subjects of this country indeed who are bound by an *English* act of parliament they might have made a good title. But if a ship be taken by hostile force, the title to that ship as against

1806.

LUCENA v. CRAUFURD and Others, in Error.

foreigners cannot be changed by any act of local legislature, but the ship must be condemned in a court proceeding according to the law of nations on rules binding not only on the subjects of the country where the court is held, but on foreigners who are not so. So far therefore from these commissioners having a power to sell the ships in *transitu*, they could never make a good title against the *Dutchmen* at sea unless the person having possession could shew the condemnation of a prize court. These principles are strongly illustrated by the evidence. The moment hostilities took place the property was condemned as prize. The power of the commissioners could never have attached upon it in the hands of the king, nor could they have any authority to deal with it, unless the king had thought proper to grant it to them. With respect to the ships in the ports of *Ireland*, he expressly constitutes them prize agents; and with respect to those brought into this country and condemned, he authorizes them to deal with the proceeds in the manner they had been instructed to deal as commissioners, and according to such instructions as they should thereafter receive. But I state it with great confidence, though I hope with proper humility, as my clear opinion, that after the declaration of hostilities the commissioners neither did deal, nor had a right to deal with the property as commissioners. His Majesty having a title to it makes them his agents, and points out to them in what manner they shall exercise that agency; directing that it should be in the same manner as if they had derived their title under the commission, and not under their special appointment as prize agents. This is not a case in which there is any averment of an interest in these commissioners beneficial to themselves, and the question is, whether the power, or faculty, or right of concern and management which these commissioners might or might not have had, which they would have had if these ships had come into

into port, and which they might have ceased to have the moment after, be the subject of a legal insurance? Since the 19 *Geo.* 2. it is clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavoured however to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party. In the 19 *Geo.* 2. as well as in every other statute and charter relating to insurance, the objects of insurance are plainly described to be ships, cargoes, wares, merchandizes, or effects. One or two later statutes mention property; but as to expectation of profits and some other species of interest which have been insured in later times, there is nothing to shew that they were considered as insurable. I do not wish that certain decisions which have taken place since the 19 *Geo.* 2. should be now disturbed, but considering the caution with which the Legislature has provided against gambling by insurances upon fanciful property, one should not wish to see the doctrines of those cases carried further, unless they can be shewn to be bottomed in principles less exceptionable than they would be found to be upon closer investigation. Lord *Kenyon*, in *Craufurd* v. *Hunter*, considered the 19 *Geo.* 2. as a legislative declaration that an insurance might have been effected before that statute without interest. It is with great deference that I entertain doubts on that subject. Ld. Ch. Baron *Comyns*, in the case of *Depaba* v. *Ludlow*, *Com.* 360., speaking of this

1806.

LUCENA v. CRAUFURD and Others, in Error.

statute says, that it was an act to affect the form of the policy: and Lord *Hardwicke* has said the same in two cases, *The Sadlers' Campany* v. *Badcock*, 2 *Atk.* 554., and *Pringle* v. *Hartley*, 3 *Atk.* 195. In the latter of which he distinctly says, that the words "interest or no interest" were meant only to dispense with the proof of interest on the trial. If then a policy with the words "interest or no interest" were stated in a declaration, and those words meant that there should be a dispensation with the proof of interest, there would be something like an averment on the one part and an admission on the other that there was an interest. I cannot conceive how such decrees could have been made in Courts of Equity as were made there previous to the 19 *Geo.* 2. if an insurance could have been made without interest, for no Court of Equity could relieve against the effect of a contract valid in law. But if the words "interest or no interest" amounted to an agreement to dispense with the proof of interest, the principles upon which those decrees proceeded may easily be accounted for. If the insurer, having admitted an interest which he supposed capable of proof, afterwards discovered that no interest existed, he might state to a Court of Equity that he had been taken by surprize in his admission, and the policy would be ordered to be delivered up. There is some strange language to be found in our books respecting wagering and valued policies, the latter of which, though frequently in effect wagering policies have been permitted, because it has been supposed that the convenience of them is greater than would result from the prohibition of them. But the language of all courts of justice has been extremely careful lest the permission of valued policies should introduce a species of gambling policies. With respect to foreign ships, the averment of interest has been dispensed with, not because insurance on them could be made without interest, but on account of the difficulty of proof. But whatever

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may have been the common law, the 19 *Geo.* 2. has prescribed what should be the law thereafter, and all courts of justice are bound to follow up the spirit of that act. If this power and faculty of future concern be an insurable interest, we ought at least to take care not to extend to such interest a protection that would be denied to policies of a more solid nature, lest that sort of wagering in policies should grow up which has of late been extending itself considerably. It has been said, that the commissioners either are or are not like trustees, consignees, or agents, and that they had as good an insurable interest as the captors in the *Omoa* case, or a creditor on the life of his debtor. If the *Omoa* case was decided upon the expectation of a grant from the Crown, I never can give my assent to such a doctrine.' That expectation, though founded upon the highest probability, was not interest, and it was equally not interest, whatever might have been the chances in favour of the expectation. That which was wholly in the Crown, and which it was in the power of His Majesty to give or withhold, could not belong to the captors, so as to create any right in them. I am far from saying however, that that case might not have been put upon other ground. The captors not only had the possession, but a possession coupled with the liability to pay costs and charges if they had taken possession improperly. There was also a liability to render back property which should turn out to be neutral, and a liability as agents to act for the king as their principal; and I should be disposed to say, that the king had an insurable interest as the person who had the *jus possessionis*. His right indeed was liable to be affected by a sentence of the Court of Admiralty. But as the insured is often entitled to consider the property as gone the moment the capture takes place, so I think that the king may be considered as against all the world as having an interest in the property before condemnation for the purpose of in-

1806.

LUCENA v. CRAUFURD and Others, in Error.

suring. With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may therefore insure. So a consignee has the power of selling, and the same may be said of an agent. I cannot agree to the doctrine said to be established in the courts below, that an agent may insure in respect of his lien upon a subsequent performance of his contract, nor can I advise your Lordships to proceed without much more discussion upon authority of that kind. There are different sorts of consignees: some have a power to sell, manage, and dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal. But in the present case the commissioners do not insure in respect of any benefit to themselves, nor of any benefit to the Crown, or to any other person or persons stated on this record; they insure merely as commissioners, and if they have a right so to insure, it seems to me that any person who is directed to take goods into his warehouse may insure; and that there is nothing to prevent the *West-India* Dock Company from insuring all the ships and goods which come to their docks. If moral certainty be a ground of insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure First the dock company, then the dock master, then the warehouse keeper, then the porter, then every other person who to a moral certainty would have any thing to do with the property, and of course get something by it. Suppose *A.* to be possessed of a ship limited to *B.* in case *A* dies without issue; that *A.* has 20 children, the eldest of whom is 20 years of age; and *B.* 90 years of age; it is a moral certainty that *B.* will never come into possession, yet this is a clear interest. On the other hand, suppose the case of the heir at law of a man who has an estate worth 20,000*l.* a-year, who

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is 90 years of age; upon his death-bed intestate, and incapable from incurable lunacy of making a will, there is no man who will deny that such an heir at law has a moral certainty of succeeding to the estate, yet the law will not allow that he has any interest, or any thing more than a mere expectation. I am the more surprized at the doctrine which has been advanced upon this subject, recollecting the case of a gentleman who had been in a state of incurable lunacy for many years, in the time of Lord *Bathurst*, who was then assisted by no less a man than Lord Chief Justice *De Grey*. Certain individuals filed a bill to perpetuate the testimony of their being heirs at law, and next of kin. Lord *Thurlow*, then Attorney-General, demurred to that bill, and the ground of his demurrer was, that though it was as morally certain as any thing could be that those individuals would succeed to the property, yet as the whole of it was in the lunatic, no part of it could be in any body else, and therefore their moral certainty raised no title in a court of justice. One of the persons to whom I am alluding concluded with these words: "Courts of justice sit here to decide upon rights and interests in property; rights in property, or interests derived out of contracts about property. They do not sit here to decide upon things in speculation. Speculative profits are nothing." I send my ship to *India*; I expect profit from the voyage; if the ship is lost my expectation is defeated, but of those expected profits the law can have no consideration, and I am sure that Lord Ch. J. *Willes* did not hold, that such expectations might be regarded in the case of *Pole* v. *Fitzgerald* (*a*); the doctrines of which case have been wounded to the quick by the representations made of them in subsequent cases; and among the rest in the first Volume of *Burrow*; which representations are most inaccurate, if they are meant to convey as the result of that case, that where there is a

(*a*) *Willes*, 641.

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1806.

LUCENA
CRAUFURD and Others, in Error.

contract under which a party is to receive profit, and such profit so secured by contract may be affected by some contingency connected with the voyage it is insurable. I do not assert that it is not insurable; but I cannot accede to that which has been stated as part of the doctrine upon this subject, that unascertained profits which may or may not be made, may be insured. The present case however assumes not only that a man may insure unascertained profits from his own losses, but that he may insure profits to arise out of ships and goods, which he has not, and which he never may have in his possession, and from the management of which he never can obtain any profit. If I were bound now to state my opinion judicially upon this first count, I should be obliged very strongly to say, that the claims of the Plaintiffs could not be supported; but I do not think it will be necessary for me to say, that I am sure that it cannot be supported to the extent to which damages have been found, for the *Zeelelye* having been lost after the declaration of hostilities, unless I mistake the act and commission altogether, she was not a ship which the Plaintiffs could have taken into their possession as commissioners; they have therefore sustained no loss as commissioners with respect to that ship; and it will be essentially necessary that a distinction should be made in the proceedings in the court below with respect to the different ships, in order that the damages may be properly computed. It appears to me that the proper mode of proceeding will be, that we do award a *venire de novo* for this purpose. The whole record will then be carried down, and the case will be open, and all the different interests which are averred in the other counts. As the matter now stands, I think it impossible to affirm this judgment. With respect to the conduct of the under-writers I have said nothing. Courts of justice have no right to tell men whether they are acting honestly or dishonestly. It is the duty of a Court to say whether they have acted legally

gally. To that consideration I have entirely confined myself.

Lord ELLENBOROUGH Chief Justice of the King's Bench.

From a due regard to your Lordships' time, and a recollection of the very urgent business which presses, I shall occupy but a very short portion of time, more especially as I entirely coincide with my noble and learned friend who has just spoken, not only in his general views of the case, and the principles which he has stated, but in every part of that discussion, and the application of every part of what he has said to this record; I will therefore only state my opinion very shortly, that the direction of the noble Lord, to which exception has been taken, cannot (independent of the general doctrines of law, upon which you have heard different opinions from the learned Judges) be sustained in its terms. The direction was, that if the jury believed the whole of the evidence, they might find a verdict for the Defendant in error upon the issue joined on the first count. That count states the periods of time at which the several losses happened, and it predicates the loss of the *Zeelelye* on the 20th of *September* 1795. That loss therefore is posterior to the declaration of hostilities which is upon the same record stated to be upon the 15th of *September*. The periods of the several losses are not laid, as is usually the case, under a *videlicet*; and it is stated that the Plaintiffs below proved that the ships and cargoes were, at the times and in the manner in the first count mentioned, damaged, lost, and destroyed, whereby an average or partial loss of 40 *per cent.* was sustained. Now the average loss given by the verdict is combined, the aggregate consisting of these ships which were lost before the declaration of hostilities, and one namely the *Zeelelye* which was lost after, and which therefore could not be lost at that time to the commissioners,

1806.

LUCENA v. CRAUFURD and Others, in Error.

commissioners, who had no antecedent power of taking possession; the property in that ship having by the declaration of hostilities become vested in the Crown *jure belli*; the loss therefore could not have been the loss of the commissioners, but of the Crown. The damages therefore being composed of an aggregate, of which one ingredient cannot by law be admitted, the finding is erroneous. With all deference to the noble Judge, the direction should have been, that as to so much of the count as charged the loss to have been sustained by the commissioners, except as to what related to the *Zeelelye*, they might find their verdict, but as he has not drawn the distinction, and the *Zeelelye* is made to form a constituent portion of the loss, the direction is upon clear principles a mistaken direction. There ought therefore to be an opportunity given for the rights of the parties to be properly adjudged, and for that purpose I should recommend to your Lordship to grant a *venire facias de novo*. Upon that *venire*, which it is competent to this House to grant, there may be a verdict found; if the evidence shall sustain it upon the count which avers the interest to be in the king. And if the party can make out his case upon that count in point of evidence, that count appears to me much more competent to sustain the case in point of law. It does not become me to anticipate the decision upon the question whether the case can be sustained or not, but by granting a new trial your Lordships would enable the parties to litigate their best title, instead of being restrained to that which is a futile one. I have a further opinion which it is unnecessary to discuss. The direction of the noble Lord being certainly erroneous in the particular which I have stated, it appears to me that there ought to be a *venire facias de novo*.

Lord CHANCELLOR (Lord *Erskine*). I will not detain your Lordships further than to state my entire concurrence

rence in the opinions delivered by my noble and learned friend, and the reasons given by my noble friend who first addressed you. I feel so much reverence for the opinion of the learned Judges, that I should have been greatly embarrassed in presuming to differ from them if this subject had not been one in which I have in a manner spent my whole life, and if I had not lived in that particular court in which questions of this sort are in daily occurrence. But I feel myself obliged to state (without anticipating at all what may be the event of a new trial) my clear opinion, that if the verdict be suffered to stand as it now does upon the first count, and above all if it be affirmed by your Lordships, judgment upon the principles on which it has been argued at your bar, and received the sanction of the learned Judges, it would introduce infinite confusion into the administration of justice, and enable persons to insure property who have no manner of right. Independent of the objections that have been taken, supposing the commissioners to have had a right at all events to take possession of these ships on their arrival in *England*, they could have had no such right after the commencement of hostilities, and after the rights of the captors and the crown had intervened. I am therefore most clearly of opinion, that a *venire facias de novo* should be granted.

The Lord Chancellor then moved, that a *venire facias de novo* should be awarded; which was ordered accordingly.

The *venire de novo* having issued, the cause was again tried before Lord *Ellenborough* Ch. J. at the *Guildhall* sittings after *Michaelmas* term 1806, when a verdict was found for the Plaintiffs upon the second count of the declaration, which averred the interest to be in the king.

At

1806.

LUCENA v. CRAUFURD and Others in Error.

At the trial a bill of exceptions was tendered to his Lordship upon two points, which it is understood are now in a course of being submitted to the opinion of the Judges.

ROE *v.* WIGGS.

Nov. 6.

If upon notice to quit given to a tenant he gives notice to his under-tenants to quit at the same time, and upon the expiration of the notice he quits so much as is occupied by himself, but his under-tenants refuse to quit, an ejectment may still be maintained against him for so much as his under-tenants have not given up.

EJECTMENT.

At the trial of this cause before *Macdonald* Ch. B. at the last *Hertford* assizes, it was proved that a notice had been duly given to the Defendant to quit the premises at *Michaelmas* 1805, which he accordingly did, and gave notice to his sub-tenants to quit also, but which they did not. It was objected on the part of the Defendant, that the sub-tenants were in possession at the time when the ejectment was brought; and that although the Defendant might be liable to an action of *assumpsit* for not delivering up possession, yet the default of others could not make him a wrong doer in ejectment. His Lordship however overruled the objection, and a verdict was found for the lessor of the Plaintiff.

Bayley Serjt. now moved to set aside this verdict, and contended, that as the interest of the Defendant ceased at *Michaelmas* 1805, and he had done every thing in his power by quitting himself, and by communicating to the other tenants that they must do the same, he ought not to be answerable in this form of action for the acts of others.

Sir JAMES MANSFIELD Ch. J. I never understood that it was necessary for a landlord to give notice to any one but his own tenant. If possession be not delivered up after such notice, the landlord may take a verdict against his

1806.

ROE v. WIGGS.

his own tenant, and sue out execution, upon which the sheriff will turn the under-tenants out of possession; and as to the costs, the Defendant ought to be subject to them if possession be not delivered up; otherwise the landlord would be in danger of having a pauper put into possession.

CHAMBRE J. of the same opinion *(a)*.

Bayley took nothing by his motion.

(*a*) HEATH and ROOKE Justices were absent.

BLAND *v.* ANSLEY and Others.

Nov. 8

In an action of trespass against the sheriff for taking the goods of *A.*, in execution for the debt of *B.*, where the question was, whether the goods had been previously assigned by *B.* to *A.* or not, *B.* was held not to be a competent witness to disprove the assignment to *A.*

THIS was an action of trespass for taking the Plaintiff's goods in execution. The cause was tried before Sir *James Mansfield* Ch. J. at the *Middlesex* sittings after last term, when it appeared that the goods in question were taken in execution in a suit against *Philip Aubray*, and the question was, Whether the goods belonged to *Aubray* or the Plaintiff? *Aubray* had sold to the Plaintiff the house in which the goods were, but whether the goods were sold at the same time was matter of dispute; and the Defendants proposed to call *Aubray* as a witness to prove that the goodswere not assigned to the plaintiff, and consequently remained his property. The Chief Justice having refused to receive the testimony of *Aubray*, a verdict was found for the Plaintiff.

Vaughan Serjt. now moved for a new trial, and contended, that *Aubray* ought to have been admitted as a witness,

1806.

BLAND v. ANSLEY and Others.

witness, insisting that he was indifferent in point of interest; for if the goods had not been assigned to *Bland* they were properly taken in execution, and *Aubray* was liable to an action at the suit of *Bland*, who claimed the goods as well as the house; and that if the goods had been assigned to *Bland*, the execution was bad, and *Aubray* remained liable to the action at the suit of his own creditor. He observed, that in an action against the drawer of a bill of exchange the acceptor may be called to prove that he had no effects of the drawer in his hands when the bill was drawn.

Sir JAMES MANSFIELD Ch. J. The object of calling *Aubray* was to prove that the goods were his own property and not that of the Plaintiff, and consequently that the execution which had been levied upon the goods to satisfy a debt owing by him was valid; he was called therefore to give evidence, the effect of which would be to pay his own debt with the Plaintiff's goods.

ROOKE and CHAMBRE Justices expressed themselves of the same opinion.

Vaughan took nothing by his motion.

1806.

EARDLY *v.* PRICE.

Nov. 10th.

INDEBITATUS Assumpsit.

The first count was for board, schooling, clothes, meat, drink, washing, lodging, books, and other necessaries, furnished to one *James Wyatt* at the request and on the credit of the Defendant, and for work and labour in instructing and teaching the said *J. W.* divers kinds of literature and learning at the request of the Defendant. The second count was on a *quantum meruit* thereon. The third count stated, that in consideration that the Plaintiff at the request of the Defendant had received and taken *J. W.* as a scholar into a certain school or academy kept by the Plaintiff, and that *J. W.* had left the same without giving due notice in that behalf, the Defendant promised to pay the Plaintiff so much money as he therefore reasonably deserved to have. There were also general counts for work and labour, and for money had and received.

Indebitatus assumpsit for board, schooling, clothes, &c. with a count on a *quantum meruit* for the same, and also a count stating that in consideration that the Plaintiff had taken *J. W.* as a scholar into an academy kept by him, and that he had left it without having given due notice, the Defendant promised to pay so much as the Plaintiff reasonably deserved to have; held that under these counts the Plaintiff was entitled to recover for a quarter over the time which *J. W.* stayed on the ground of a quarter's notice not having been given, that being one of the terms upon which he was taken.

The cause was tried before Sir *James Mansfield* Ch. J. at the *Westminster* Sittings after last *Hilary* term; when the terms of the plaintiff's school were given in evidence, by which it appeared, that 30*l.* a-year were to be paid for each scholar; and at the foot of the terms was added this stipulation, "a quarter's notice is required to be given before the removal of any young gentleman from school, or to pay for a quarter." *James Wyatt* having been removed without notice, the Plaintiff claimed a right to recover 7*l.* 10*s.* pursuant to the above stipulation. On the part of the Defendant it was objected, that no damages could be recovered upon the general counts, but for what had been actually furnished, and that there was no special count in the declaration so framed as to meet the Plaintiff's demand. The Chief Justice over-ruled the objection, and a verdict was found for the Plaintiff.

1806.

EARDLEY v. PRICE.

Best Serjt. now moved for a new trial, and renewed the objection which had been made at *nisi prius*, insisting that the Plaintiff under an implied contract could only recover for the board, lodging, &c. actually supplied to *J. W.* during the time that he was at school, and that if he were entitled to any thing more, it must be by virtue of some express contract which ought to be stated on the declaration; that the contract stated on the declaration was to pay for things actually furnished, but that the contract insisted upon was to pay for something which had never been had.

Sir JAMES MANSFIELD Ch. J. The terms of the school are, that 30*l.* a-year shall be paid; but that if the scholar be taken away without notice, an additional quarter shall be paid; still however the thing to be paid for is that which has been supplied. The price for half a year is 15*l.*, but if at the end of half a year the scholar is taken away without a quarter's notice, the price for the half year is to be 15*l.* and 7*l.* 10*s.* These are the terms upon which the Plaintiff agreed to supply his scholars. The moment that the scholar was taken away without notice, the master was entitled to be paid the additional quarter, which shews that the additional price was for the things previously furnished. I am therefore clearly of opinion, that the case is within this declaration.

ROOKE J. I am of the same opinion.

CHAMBRE J. The contract in this case being no longer executory at the time when the demand arose, the objection founded upon the stipulation being matter of special contract does not apply.

Best took nothing by his motion.

PENFOLD *v.* WESTCOTE.

Nov. 10th,

If one call another "thief," together with many other names of general abuse not imputing crime, and no other evidence being given to explain the sense in which the word "thief" was used, the jury find for the Plaintiff, the Court will not set the verdict aside, for the action may be maintained for the word "thief."

THIS was an action for calling the Plaintiff a thief. At the trial before *Chambre* J. at the last *Winchester* assizes it was proved that the Defendant said of the Plaintiff, "Why don't you come out you blackguard rascal, scoundrel, *Penfold*, you are a thief:" but the witness who proved the words was not asked whether by the word "thief" he understood that the Defendant meant to charge the Plaintiff with felony. The learned Judge in his direction to the jury said, that it lay on the Defendant to shew that felony was not imputed by the word "thief:" and a verdict was found for the Plaintiff.

Bayley Serjt. now moved to set aside this verdict, and contended that it appeared from the expressions which accompanied the word "thief," that the Defendant did not intend to impute felony, but merely used that word together with the others in the heat of passion; that no evidence was given to shew that the word "thief, was understood by those who heard it to charge the Plaintiff with any crime; and unless it were used with that intention, the Defendant was entitled to a verdict.

Sir JAMES MANSFIELD Ch. J. The jury ought not to have found a verdict for the Plaintiff unless they understood the Defendant to impute theft to the Plaintiff. The manner in which the words were pronounced, and various other circumstances might explain the meaning of the word; and if the jury had thought that the word was only used by the Defendant as a word of general abuse, they ought to have found a verdict for the Defendant. Supposing that the general words which accompany the word "thief" might have warranted the jury in finding for the Defendant, yet as they have not

1806.

PENFOLD v. WESTCOTE.

done so, we cannot say that the word did not impute theft to the Plaintiff.

ROOKE J. of the same opinion.

CHAMBRE J. The objection was made at the trial; and the matter left to the jury. I doubt however whether there was any thing for them to decide upon: for as nothing was given in evidence to explain the word "thief," it could scarcely be considered as imputing any thing but theft.

Bayley took nothing by his motion.

HODGSON *v.* MALCOLM.

Nov. 11th.

In moving a ship from one part of an harbour to another it became necessary to send two of the crew on shore to make fast a new line and cast off the rope by which the ship was made fast; those two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore and was lost: held a loss by perils of the sea within the policy.

THIS was an action on a policy of insurance in the usual form upon the ship *Dolly* at and from *Plymouth* to *Sunderland*. In the first count of the declaration it was averred, that the *Dolly* during her abode at *Plymouth* was by the perils of the seas and by force and violence of the winds and waves greatly broken, shattered, strained, damaged, stranded, and wholly lost. In the second count it was averred, that the said ship during her abode at *Plymouth*, by the perils of the seas and strong tempestuous weather, and the force and violence of the winds and waves, ran aground, and was greatly broken, shattered, strained, damaged, stranded, and wholly lost.

At the trial before Sir *J. Mansfield* Ch. J. at the *Guildhall* sittings after last *Hilary* term, it was agreed that the protest of the master mate, and a seaman of the *Dolly*, dated the 16th of *April* 1805, should be read as evidence of the facts therein stated. The following is an extract of so much of the protest as detailed the facts:

facts: "That they the appearants sailed in the said vessel from *Sunderland* on the 14th of *March* last, with a cargo of coals bound therewith to the port of *Plymouth*, where they arrived on the 21st of the same month, and afterwards discharged a part of their cargo at *Stonehouse*, alongside the town quay there. That having to discharge the remainder of their cargo in *Sutton Pool* at *Plymouth*, they the said appearants on the 4th instant, at 6 o'clock P. M. took a pilot on board to transport the said vessel with the remainder of the cargo to *Sutton Pool* for that purpose, and warped her down to the entrance of *Stonehouse Gut* in their way thither; whereupon the pilot sent two of the crew ashore in the ship's boat to make fast another line to the shore, and to cast off their former fast, who were immediately impressed by some officers in His Majesty's service in sight of the ship: that thereupon the said appearant the master particularly desired the officers to suffer the men to cast of the rope, and to send off the boat to the ship (being the only one belonging to her,) but they would not do either, and gave no answer, and carried away and kept the men for three quarters of an hour, when they were sent back again to the ship. That in consequence of the rope not being cast off by the means aforesaid, the bows of the vessel were checked and she went ashore, nearly at high water, where she grounded. That the said appearant, the master, afterwards procured lighters to lighten the said vessel by taking out a part of her cargo for the purpose of floating her, by which means they got her off, but the said vessel in consequence of being ashore has strained very much, and made a great deal of water."

No other evidence being given, the Defendants counsel objected, first, that the loss did not arise from the perils insured against; and 2dly, that it did not arise from any peril of the sea, as averred in the declaration; and the Chief Justice being of this opinion nonsuited the Plaintiff.

1806.

HODGSON v. MALCOLM.

A rule having been obtained calling on the Defendant to shew cause why this nonsuit should not be set aside, and a new trial be had,

Best Serjt, shewed cause, and contended that the loss appeared by the protest to have been occasioned by the improper conduct of the persons on shore in not permitting the rope to be cast off; that the underwriters were not answerable for the misconduct of the officer, against whom the Plaintiff might bring an action; and that at all events the loss which had arisen from negligence or misconduct was not attributable to the perils of the seas according to the averment in the declaration.

Bayley Serjt. in support of the rule. The loss is to be attributed to the perils of the seas. It ought to be assigned to the immediate cause, and the immediate cause in this case was the water which drove the vessel on shore. If a ship be lost in the course of navigation through the negligence of the master, the loss does not the less arise from the perils of the sea: though the assured cannot recover on account of his implied undertaking that the master shall do his duty. Suppose the men, instead of being impressed had been struck dead by lightening, in consequence of which the ship had gone on shore: the loss would not be considered as occasioned by lightening, but by the perils of the sea. Suppose a ship to be insured against all the ordinary perils except fire, and to be driven by a storm from her moorings against another vessel on fire, and burned, or the cables to be burned, and the ship driven on shore: in the former case the assured could not recover for the damage by fire, and in the latter he might recover for the stranding. If a ship be driven by a storm on the enemy's coast and captured, the Plaintiff must declare for a loss by capture. Here the regulation of the vessel depended upon the rope as well as the winds and waves; and in consequence of the rope not being cast

cast off, the winds and waves operated upon the vessel and drove it on shore. This was therefore a loss immediately by a peril of the sea, and consequently the underwriters are liable. If the officer be answerable for any misconduct of his which was the original cause of the loss, the underwriters may have an action against him in the name of the assured.

After the argument of this case it stood over for the opinion of the Court, and now on this day,

Sir JAMES MANSFIELD Ch. J. said; in this case the ship was driven on shore by the force of the wind only, because the rope was not cast off. The assured contend that this omission was not through the negligence of those for whom they are answerable, for that they attempted to do what was proper to be done, but were prevented from doing it by the interference of the press-gang. But why are the underwriters to be answerable for this interference of the press-gang? It was the duty of the captain and crew to do that, which not having been done gave rise to the accident. Looking at the case in this point of view, it struck me that the peril by which the ship was lost was not a peril against which the underwriters insured. As between the assured and the underwriters, the omission to do that which it was the duty of the captain and crew to have done may be deemed negligence, though not as between the ship-owners and those whose goods were on board. Suppose a press-gang were to take out of a ship at sea every sailor, the consequence would be that the ship would be lost, and yet I doubt whether the underwriters would be liable in such a case. The argument on behalf of the assured is, that the loss does not arise immediately from the press-gang but from the waves; I cannot however, as at present advised, consider this a loss for which the underwriters are liable.

1806.

HODGSON v. MALCOLM.

HEATH J. I differ in opinion with my Lord Chief Justice, and so do my two Brothers, consequently there must be a new trial. It will not therefore be necessary for me to state the grounds upon which I think this a loss within the policy.

ROOKE J. Although the peril by which the ship was lost may have been occasioned by the act of the press-gang, still the peril by which she was lost, and of which the assured complains, is the peril of the sea.

CHAMBRE J. The underwriters are liable, unless they can impute negligence to those who had the care and management of the ship. Now in this case no blame rests with them, for they could not resist the force of the press gang. They were about to do all that was right to be done, but were prevented by an irresistible force. Indeed the press-gang is not the necessary cause of the loss; for supposing all the hands to be taken out of a ship at sea, still the ship might be picked up and saved. An act of that kind therefore is not the inevitable cause of the loss.

The Court were about to make the rule absolute for a new trial, but after some conversation directed the nonsuit to be set aside, and a verdict to be entered for the Plaintiff.

1806.

JEKYLL *v.* Sir JOHN MOORE.

Nov. 12th.

If a Court Martial, after stating in their sentence the acquittal of an officer against whom a charge has been preferred, subjoin thereto a declaration of their opinion that the charge is malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused is highly injurious to the service, the president of the Court Martial is not liable to an action for a libel for having delivered such sentence and declaration to the Judge-Advocate.

THIS was an action for a libel. The declaration after stating that the Plaintiff was an officer of the 43d regiment, and had preferred certain charges against Colonel *Stewart* of the same regiment, which were tried by a general Court Martial, alleged that the Defendant, of and concerning the Plaintiff as such officer and the said charges against Colonel *Stewart*, published the following libel: "The Court cannot pass without observation the malicious and groundless accusations that have been produced by Captain *Jekyll*, against an officer whose character has, during a long period of service, been so irreproachable as Colonel *Stewart*'s; and the Court do unanimously declare that the conduct of Captain *Jekyll*, in endeavouring to falsely calumniate the character of his commanding officer, is most highly injurious to the good of the service."

Plea Not guilty.

At the trial before Sir *James Mansfield* C. J. at the *Middlesex* Sittings after last *Trinity* term, it having been proved that the Defendant was president of the Court Martial, and that the supposed libel formed part of the opinion of the Court delivered by the Defendant to the Judge-Advocate for the purpose of being submitted to the king; and immediately followed the declaration of the opinion of the Court Martial, "That he the aforesaid Colonel *Richard Stewart* is not guilty of either of the charges, and the Court do most fully and most honourably acquit him;" his Lordship nonsuited the Plaintiff.

Best Serjt. now moved for a rule to shew cause why this nonsuit should not be set aside, and a new trial granted; contending, that although the Defendant was not

1806.

JEKYLL v. MOORE.

not liable to an action for any thing contained in the sentence of the Court Martial upon the matters submitted to it by the King for its decision, yet that the libel in question was no part of the sentence, which ended upon the acquittal of Colonel *Stewart*. That the conduct of the Plaintiff formed no part of the matters submitted to the Court; and that consequently whatever the Defendant published respecting it was not done in the discharge of his duty, and therefore the Defendant was responsible for it in a civil action.

Sir J. MANSFIELD Ch. J. In order to enable the Court Martial to decide upon the charges submitted by the King, they must hear all the evidence as well on the part of the prosecution as of the defence, and after hearing both sides are to declare their opinion whether there be any ground for the charges. If it appear that the charges are absolutely without foundation, is the president of the Court Martial to remain perfectly silent on the conduct of the prosecutor; or can it be any offence for him to state that the charge is groundless and malicious? It seems to me that the words complained of in this case form part of the Judgment of acquittal, and consequently no action can be maintained upon it.

ROOKE and CHAMBRE Js. of the same opinion;

Best took nothing by his motion.

DOE, on the Demise of BRISCOE and Others, *v.* CLARKE and Wife.

Nov. 19th.

THIS was an action of ejectment, brought to recover certain premises situate in the parish of *St. Mary* in the borough of *Warwick*, which came on to be tried at the last assizes for the county of *Warwick* before *Graham* B., when a verdict was given for the lessors of the Plaintiff, subject to the opinion of the Court on the following case:

Thomas Briscoe, the grandfather of the lessors of the Plaintiff, being seised in fee of the premises mentioned in the declaration, by his will, dated the 25th day of *September* 1781, duly executed and attested to pass real estates, devised as follows:

And as to that worldly estate wherewith it hath pleased God in his kind providence to intrust me, I dispose thereof in the following manner: I give to my dearly beloved wife during her natural life all those my houses and appurtenances thereunto belonging, being in the *Swan-lane*, and are now in the tenure or occupation of *James Gavan* school-master, widow *Tanton* staymaker, *Ralph Morris* clogmaker, widow *Sharp* butcher, widow *Ward*, and *Sarah Flint*, and the yard, shops; stables, and the little garden I have lately inclosed. I likewise give her all the rents which shall be due from the aforementioned tenants or tenements on the next quarter day after my death. I give to my daughter *Mary Russell* the sum of ten pounds, to be paid her within six months after my death. And

Testator, after a general introductory clause "as to his worldly estate," devised to his wife during her natural life all his houses in *Swan-lane*, he then devised several houses without words of inheritance to his sons *T. B.* and *S. B.* and after the death of his wife he gave to his son *W. B.* all those his three houses or tenements situate in *Swan-lane*, in the tenure or occupation of *A.*, *B.*, and *C.*; he likewise gave several legacies to be paid within six months after his death, and concluded thus, "and I charge all my estates both real and personal with the payment of the above or aforementioned legacies, and I appoint my beloved wife and my son *T. B.*, my son *S. B.*, and my son *W. B.*, executors of this my will, and after my just debts and funeral expences are paid, then the surplus of my effects, both real and personal, to be equally divided to my executors which shall be then living.

Held that *W. B.* only took an estate for life under the devise of the three houses in *Swan-lane* after the death of his mother, notwithstanding the words of charge, &c. but that he took a fee in one-fourth part under the residuary clause.

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1806.

DOE
v.
CLARKE.

likewise I give her two tenements, with the appurtenances thereunto belonging, situate and being in *Friars Lane*, and are now in the occupation of *John Moore* carpenter and *John Squires* blacksmith; and for want of issue at her death, then my will is that the said two tenements be divided amongst my sons, *Thomas*, *Samuel* and *William*, or their children who shall be living at her death. I give to my son *Thomas Briscoe* the reversion of the lease of the house I now inhabit: I likewise give him the reversion of the lease of the house in *Gaol Yard Lane*, and likewise the reversion of the lease of the brickkiln in *Wedgnock Lane*: and likewise I give him a piece of land I have lately erected a brickwork on, with the hovel, kiln, and the appurtenances thereunto lying in the bridge end by the side of the road leading to *Lemington*. I likewise give him the share of an estate I lately bought of *Thomas Stratford*. I likewise give unto him, after the death of my beloved wife, all those my two tenements or houses in the *Swan Lane*, and are now in the tenure or occupation of *James Gavan* schoolmaster, and the widow *Tanton* staymaker. I likewise give him, after the death of my beloved wife, all that my house in the back yard now in the tenure of *Sarah Flint*; and likewise I give him, after the death of my beloved wife, all that my yard, shops, stables, and my little garden; I likewise give him forty pounds to be paid him in twelve months after my death. I give to my son *Samuel Briscoe*, at my death, all that my house, with the appurtenances thereunto belonging, situate and being in the *Jury Street*, and is now in the tenure or occupation of *William Russell*. I give to my son *William Briscoe*, after the death of my beloved wife, all those my three houses or tenements situate in the *Swan Lane*, and are now in the tenure or occupation of *Ralph Morris* clog-maker, and the widow *Sharp* butcher, and the widow *Ward*. I give to my daughter *Sarah Ash* the sum of ten pounds, to be paid her within six months after my death: I likewise give her all those my two houses or tenements

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in the *Cow Lane*, and are now in the tenure or occupation of *Joseph Clarke* and —— *Whitehorn*. I give to my late daughter *Elizabeth Banner*'s three children, in equal proportions, all that my house or tenement situate and being in the *Saltisford*, now in the tenure of *Sarah Wood*. And I charge all my estates both real and personal with the payment of the above or aforementioned legacies; and I appoint my beloved wife and my son *Thomas Briscoe*, my son *Samuel Briscoe*, and my son *William Briscoe*, executors of this my last will and testament; and after my just debts and funeral expences are paid, then the surplus of my effects both real and personal to be equally divided to my executors which shall be then living."

The premises for which this ejectment was brought were the three houses in the *Swan Lane*, devised after the death of the testator's wife to his son *William Briscoe*. *Thomas Briscoe* the testator, after making his said will, died in *October* 1784, leaving *Mary Briscoe* his widow, and his sons *Thomas*, *Samuel*, and *William*, and his daughters *Mary Russell* and *Sarah Ash*, him surviving. *Mary Briscoe* the widow continued in the possession of the premises until her death which happened in *June* 1785. Upon her death *William Briscoe*, the devisee in remainder, entered upon them, and continued in possession thereof until his death, which happened in *August* 1792. *William Briscoe* before his death by his will devised the premises in question by the name of his three tenements and premises adjoining, together with the appurtenances, situate in the borough of *Warwick*, in a certain place or street there called *Swan Lane*, and then in the several tenures or occupations of *George Cashmore*, *Benjamin Evans*, and widow *Sharp*, to his wife *Sarah Briscoe*, now *Sarah Clarke*, one of the Defendants, for her life, and then to such child or children of his said wife by him lawfully begotten, and for want of such issue then to such child or children of his brother *Thomas Briscoe*, as should

1806.

DOE v. CLARKE.

should be living at the time of the decease of his said wife. The Defendant *Sarah* the wife of *William Briscoe* continued in the possession of the said premises from her husband's death until her intermarriage with the other Defendant *Joseph Clarke* in *February* 1796, and both the Defendants have been in possession ever since. *Mary Briscoe*, the widow of the testator, died intestate, and *William Briscoe*, the lessor of the Plaintiff, is the eldest son of *Thomas Briscoe*, the eldest son of the testator, and is heir at law of the testator and his widow, and of the said *Thomas Briscoe*, *Samuel Briscoe*, and *William Briscoe* their sons, the said *Samuel* and *William* dying without issue.

The question for the opinion of the Court was, whether the lessor of the Plaintiff was entitled to recover the whole, or any, and what part of the premises in question under the ejectment. If the Court should be of opinion that the Plaintiff was entitled to recover the whole, then the verdict was to stand; if part only of the said premises, then the verdict was to be entered accordingly. But if the Court should be of opinion that the Plaintiff was not entitled to recover any part of the said premises, then a verdict was to be entered for the Defendants.

Williams Serjt. for the Defendant was called upon to begin. I contend that *William Briscoe* took an estate in fee under the will of *Thomas Briscoe* in the three houses situated in *Swan Lane*. Though it cannot be argued after the case of *Doe d. Wright* v. *Child*, 8 *Term Rep.* 64. 1 *New Rep.* 335. that the words of the will are sufficient to carry a fee, yet the meaning and intention appear sufficiently from the whole will to warrant the Court in adopting that construction. First, the introductory clause shews that the testator did not mean to die intestate as to any part of his estate. Secondly, the devise to the testator's wife shews that he knew what words to use, when he meant to give only an estate for life. Thirdly, the legacies are charged on the real estate, some of them being

being payable at six and some at twelve months after the testator's death. The legacies therefore must be paid at the times appointed by the person to whom the estate is given, and he may never live to receive a sum equal to what he is obliged to pay. When land is devised to a man paying a legacy out of the land, the legatee may maintain an action for the legacy against the devisee of the land; though no action can be maintained for a legacy not so charged. In the case of *Andrew* v. *Southhouse*, 5 *Term Rep.* 292. where the devise was to *L. A.* for life, and after her death to *E. S.*, charged and cheargeable with an annuity of 20*l.* to *J. C.* for his life; it was held that *E. S.* took an estate in fee on account of the charge, though by the words the charge was upon the land, and not upon the person. So in *Doe d. Stevens* v. *Snelling*, 5 *East*, 87. where the devise was to *G. S.* and his wife of a messuage, after having thereout first paid and discharged the testator's debts and funeral expences. Whenever the devise is to one paying a sum of money out of the estate devised, a fee will pass. And in *Doe d. Palmer* v. *Richards*, 3 *Term Rep.* 358. the Court considered the words, "my debts and funeral expences being thereout paid," to be a charge upon the devisee to pay. Then what is the difference between the charge in that case and the present? Fourthly, if *William Briscoe* did not take a fee in the three houses under the special devise to him, he took a fee in one fourth by virtue of the residuary clause, which gives to the four executors the surplus of the testator's effects real and personal, after payment of his debts and funeral expences. By this clause all the estate not before disposed of passed to the executors. *Hogan* v. *Jackson*, *Cowp.* 299.

Bayley Serjt. *contrà*. First, the case of *Right* v. *Sidebottom*. *Doug.* 759. is sufficient to establish, that the introductory words will not carry a fee. And the circumstance of one shilling having been given to the heir at law in that

1806.

DOE
v.
CLARKE.

that case, is stronger than that of an express devise for life in a former part of the will having been given in this, to shew that a fee was intended. Secondly, with respect to the charge, the distinction which runs through all the cases is, that if the charge be merely upon the estate, and not upon the person, it will not carry a fee. The case of *Doe d. Palmer* v. *Richards* is commented upon in *Doe d. Mellor* v. *Moore*, in Error, 1 *Bos. & Pul.* 30. *where the* Chief Baron disputed the propriety of the judgment, and Lord *Ellenborough* in *Doe* v. *Snelling* approved the doctrine and principles of that case, which were founded upon the idea that a charge upon the devisee would enlarge the devise to a fee, but thought that the words of the will hardly warranted the application of the rule to that case. The same distinction is to be found in *Goodtitle* v. *Maddern*, 4 *East*, 496. In the case of *Andrew* v. *Southouse* the words of charge applied to the person of the devisee. Thirdly, though it may be admitted that the words "surplus of real effects" will carry the freehold inheritance, if the intention of the testator to use them in that sense appear; yet in this case it cannot be supposed that by the words of the residuary clause the testator intended to carry them to that extent.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Sir JAMES MANSFIELD C. J. The title of the defendants under the will of *Wm. Briscoe* to the whole depends upon that clause in the will of *Thomas Briscoe* the grandfather, in which he devises to his son *William Briscoe* alone; and their title to the 1-4th part upon the last clause of the same will where he devises to him jointly with his mother and his two brothers. This is as unfortunate a will as a court of judicature could possibly have to determine upon; for I have no doubt that our decision will be contrary to the real intention of the testator.

1806.

DOE v. CLARKE.

testator. Indeed I am confident that the testator, in giving an estate for life in the houses to his wife, and afterwards giving them generally to his sons in the same manner as he would have given them a horse or any other chattel, must have intended to convey an estate in fee to them. His widow may have been, for any thing that appears on this case, a young woman, and a mere estate for life to his sons after the expiration of her estate for life would be a miserable provision. However the old rule, of which we have heard so much, *viz.* that a general devise passes only an estate for life, unless there be something in the will shewing a different intention, makes it impossible for us to hold that *William* took more than an estate for life. It has been contended, that as the property devised is charged with the payment of legacies a fee will therefore pass to the devisees; and in support of this proposition the cases of *Doe* d. *Stevens* v. *Snelling*, and *Doe* d. *Palmer* v. *Richards*, have been cited. It is not necessary for me to go through these cases. The last of these two cases when decided surprised me much, for the words of the will there merely created a charge in respect of the legacies upon the estate; and the words of charge in this case do not differ, except that they are more direct and general. In *Collier*'s case, 6 *Co.* 16. the land was devised to the testator's brother, "paying to one 20*s*. and to others small sums," and there the devisee was adjudged to have a fee, because he was personally liable, and after payment of the legacies, and before satisfaction might die. And there the true distinction was taken, *viz.* that if the land had been devised to him to the intent that with the profits of the land he should pay the legacies, he would have taken only an estate for life. The reasoning, therefore, upon which in that case it was decided that the devisee took a fee does not apply to this case, where the legacies are merely a charge upon the estate, and the devisee can never be personally liable, because whatever is to be paid in discharge of the lega-

1806.

DOE v. CLARKE.

cies is to be paid out of the estate. Unless, therefore, we were to adopt a new rule, totally different from that laid down in *Collier's* case, a general devise of land cannot be held to give a fee on account of legacies charged upon that land. In *Doe* d. *Stevens* v. *Snelling* Lord *Ellenborough* seems to think that if debts or legacies are to be paid out of the estate at all events that there the devisee must take a fee. But what difference does it make whether the testator directs the legacies to be paid out of the estate, or to be paid by the devisee out of the estate? In neither case can the devisee be a loser, which is the only principle upon which a fee is given to him. To consider such a charge a personal charge is most extraordinary, since there can be no doubt but that if such devisee were to die before the testator it would still be a charge upon the estate. That has been decided repeatedly in the Court of Chancery (*a*), and it is quite established that the charge exists as a charge upon the estate, notwithstanding the death of the devisee in the lifetime of the testator. In this case the testator has not charged any particular part of the estate devised among several devisees, and there is no case which has decided that a general charge upon the whole estate will give a fee to the devisee of any particular part of that estate. We are therefore of opinion, upon that part of the will which devises the houses in question to *William Briscoe*, that under that devise he took only an estate for life.

With respect to the question which arises upon the residuary clause of this will, my own opinion is, that though the testator has by mistake, as it seems to me, thrown in the word *real*, he had no conception at the time that he was devising any real estate by that clause. He could not mean to give a fee over again which, I doubt not, he thought he had already done by the former devise; but it would be very hard upon *William Briscoe* to use that supposed intention in the former clause

(*a*) See *Viner*, tit. *Charge*.

of

1806.

DOE v. CLARKE.

of the will from which he is not allowed to derive any benefit, in order to defeat his claim under this residuary clause. An argument has been urged, and I think very strongly, against the possibility of the testator intending to give to the widow the remainder in fee in these three houses, from the circumstance of his having previously given her an estate for life in them. If, therefore, this residuary clause has the effect of giving to the widow a fee in 1-4th in remainder, it will be not a little singular that this remainder will not take effect till the death of the widow, who had the first life estate in the houses, and the death of her son *William*, who had the second life-estate in them; for they must both necessarily be dead before this remainder takes effect. That argument does appear to be strong against the possibility of such a devise being intended. It is, however, possible that though he may have thought that he had disposed of all his real estate, yet that he may have chosen to provide against the chance of leaving any thing undisposed of. Upon this supposition, unless the Court take upon them to reject the word *real*, this remainder must pass to the lessor of the plaintiff. It would be a stretch in construction to reject the word *real* if it be possible to give any effect to it, and there is the less reason for rejecting it because in the former part of the same sentence he has introduced it where he creates the charge; and if we do not reject the word *real* in the former part of the sentence, we must suppose him to use it intentionally in this latter part also. Upon the whole, therefore, I do not feel myself warranted in denying to the word "real" its full force and effect. It is very difficult to make any sense of this devise, containing, as it does, the words, "which shall be then living." Supposing it to be mere personalty that is to be so divided, at what period would this personalty have been divisible? A thousand accidents might happen to prevent the debts being paid

1806.

DOE v. CLARKE.

immediately. From the necessity of giving, if possible, some effect to the word "real," and there being some real property undisposed of, we think that the lessor of the Plaintiff, as standing in the place of *William Briscoe*, is entitled to three parts in four of the property in question. The case of *Hogan* v. *Jackson* comes very near this, though it is not quite so extraordinary.

Postea to the Plaintiff.

Nov. 20th.

M'CULLOCK *v.* ROBINSON.

A commission of bankrupt having issued against the Plaintiff, who was gone with his family to *New York*, upon the petition of the Defendant, who was the only creditor and had chosen himself sole assignee, and the Plaintiff having brought an action against the Defendant to try the commission; the Court refused to stay the proceedings till he should give security for costs.

THIS was a rule to shew cause why proceedings should not be stayed till the Plaintiff should give security for the costs of the action. A commission of bankrupt had issued against the Plaintiff on the petition of the Defendant, who was the sole creditor, and had chosen himself assignee, and the action was brought to try the validity of the commission. The ground of the application was that the Plaintiff, with all his family, was resident at *New York* in *North America*: It was sworn that the Plaintiff's partner, at a private meeting, being asked where the Plaintiff's residence was, stated that he was at *New York*, as appeared by a letter from him; and the deponent in the affidavit swore to the fact, as he had been informed and believed. In answer to this it was sworn; that a letter had been written to the Plaintiff to come to *England* and appear to his commission, and that he was expected to return.

Shepherd and *Bayley* Serjts. shewed cause against the rule, and contended that none of the cases had gone so far as to authorize this application; that it did not appear that the Plaintiff was permanently resident abroad, and that it was expressly sworn that he was expected to return;

return; that the Defendant being assignee under the commission, had possessed himself of all the Plaintiff's property, and thereby rendered it impossible for the latter to give any pledge to those who might become security for him; and that it would be unreasonable therefore to stay the proceedings in this action till such security was given, when the object of the action was to try the Defendant's right to take the Plaintiff's property under the commission.

Best Serjt. in support of the rule, insisted that as the Plaintiff was out of the jurisdiction of the Court, and sworn to be resident with all his family out of that jurisdiction, he ought not to be permitted to proceed in this action without giving security for costs, since his person could not be taken in execution; and that the circumstance of his property having been taken under the commission was no ground of exception to the general rule in these cases, since if that were admitted, the poverty of any Plaintiff might equally be urged as a reason for not requiring security.

Sir JAMES MANSFIELD C. J. There may be some hardship upon a person who has taken out a good commission being obliged to try the validity of it in an action, when all the costs must fall upon himself. But here the Plaintiff has no property, the Defendant as assignee is entitled to all his property present and future, for no one else has proved under the commission. The Plaintiff can give no counter security to those who may be bound for him. In many cases to say that a man should not proceed without giving security would be to say that he should not contest the bankruptcy; for it may be very long before the Plaintiff may be able to return to this country. Unless, therefore, there be some positive rule which requires us to stay these proceedings till security be given, I think that we ought not to do it.

1806.

M'CULLOCK v. ROBINSON.

But I do not apprehend that it has ever been laid down that a party who goes abroad must, under all circumstances, give security for costs or be subject to have his proceedings stayed. Here, though there may be some hardship upon the Defendant, there would be much greater on the other side if the application were allowed.

ROOKE J. The general rule, no doubt, is, that where the Plaintiff is out of the jurisdiction of the Court he may be called upon to give security for costs. But that rule is subject to be modified, according to the circumstances of each particular case. Here the Plaintiff disputes his own bankruptcy, and can have no property as long as the bankruptcy remains in force to place in the hands of his sureties. I think, therefore, that in this case security should not be required.

CHAMBRE J. By the general rule of law every man not legally incapacitated may sue without giving security for costs. But the Court has interposed in certain cases and required security. This, however, is matter of discretion; and being so, the rule which has been adopted is not so positive and inflexible as not to yield to particular circumstances; and if it ought to yield at all, I can hardly conceive a stronger case than the present. The Plaintiff has no property to be laid hold of by his sureties, but the Defendant, who asks for the security, has it all. This, therefore, is a very fair case in which to relax from the general rule, that being a rule of discretion and not of positive law.

Rule discharged.

1806.

(IN THE EXCHEQUER-CHAMBER.)

BRISTOW and Others, Executors of HENRY SIMMONDS, *v.* WADDINGTON and Others, in Error.

Nov. 20th.

THIS was a writ of error brought to reverse a judgment given by the Court of King's Bench for the Plaintiffs below. The declaration stated, that *H. Simmonds* in his lifetime, before and at the time of making his promise and undertaking hereinafter next mentioned, was possessed of divers, to wit, 22 acres of land, situate, lying and being in the county of *Kent*, and on which said land certain hops were then growing; and the said *H. Simmonds* being so possessed thereof, the Plaintiffs below heretofore and in the lifetime of the said *H. S.* to wit, on the 13th of *November* 1799, at, &c., at the special instance and request of the said *H. S.*, bargained for and agreed to buy of the said *H. S.*, and the said *H. S.* then and there agreed to sell to the said Plaintiffs all the hops then growing on the said land, at the rate of 10*l. per cwt.*, to be therefore paid by the Plaintiffs to the said *H. S.*, and to be delivered in pockets by the said *H. S.* to the said Plaintiffs at *Whitstable* in the county of *Kent*; and in consideration thereof, and also in consideration that the said Plaintiffs at the like special instance and request of the said *H. S.* had then and there, to wit, at, &c. undertaken and faithfully promised the said *H. S.* to accept and receive the said hops of and from the said *H. S.*, and to pay him for the same at the rate aforesaid, he

Declaration stated that *H. S.* being possessed of land, on which hops were growing, agreed to sell to *F. W.* all the hops then growing on the said land at 10*l. per* cwt. to be paid by *F. W.* to *H. S.* to be delivered in pockets by the said *H. S.* to *F. W.* at *Whitstable* in *Kent*; that in consideration that *F. W.* undertook to accept and pay for the hops *H. S.* promised to deliver them at the place and manner aforesaid in a reasonable time next after they should be picked and gathered; that the hops were picked and gathered, and amounted to 2 cwt., and although a reasonable time for delivery had elapsed, and although the said *F. W.* was during that time and afterwards ready and willing to accept and

pay for the hops at the rate and in manner, &c. yet *H. S.* had not delivered them.

Held, 1st, that the sale of hops growing on the land was not illegal, it not being averred that they were bought to sell again; 2d, that it was not necessary for the Plaintiff to aver any request or notice to deliver at any particular time or any tender of the price, it appearing that the first act was to be done by the vendor; 3dly, that upon affirmance of judgment for the Plaintiff in the Exchequer-chamber he was not entitled to interest.

1806.

BRISTOW v. WADDINGTON in Error.

the said *H. S.* undertook and then and there faithfully promised the said Plaintiffs to deliver the said hops to them the said Plaintiffs at the place and in manner aforesaid, in a reasonable time next after the same should be picked and gathered; and the said Plaintiffs averred that the said hops were afterwards and in the lifetime of the said *H. S.*, to wit, on the 1st of *October* 1800, picked and gathered; and that the same amounted to a large quantity, to wit, 2 *cwt.* of hops; and although a reasonable time for the delivery of the said hops to the said Plaintiffs as aforesaid had long since elapsed, and the said Plaintiffs were during that time and afterwards ready and willing to accept and receive the said hops of and from the said *H. S.*, in his lifetime, and from the Defendants below, executors as aforesaid, since the death of the said *H. S.*, and to pay for the same at the rate and in the manner aforesaid, yet the said *H. S.* in his lifetime, and the said Defendants below, executors as aforesaid, since the death of the said *H. S.* not regarding, &c. did not nor would within such reasonable time as aforesaid, or at any time afterwards, deliver the said hops, or any part thereof, to the said Plaintiffs, &c. whereby, &c. The second count stated, that in the lifetime of *H. S.* and at his instance and request the Plaintiffs bargained for and agreed to buy of *H. S.*, and *H. S.* agreed to sell to the Plaintiffs all the hops then growing on 22 acres of land of *H. S.* at 10*l.* *per cwt.* to be delivered by *H. S.* to or for the Plaintiffs at *Whitstable*, and that in consideration thereof, and that the Plaintiffs, at the instance and request of *H. S.* had promised to accept and receive the hops, and pay for the same at the rate aforesaid, *H. S.* promised to deliver the hops to the Plaintiffs at *Whitstable* within a reasonable time after the same should be picked and gathered; that the the hops were picked and gathered, and amounted to 2 *cwt.*; and although a reasonable time for the delivery had elapsed, and the Plaintiffs were during that time and afterwards ready and willing

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to accept and receive the hops from *H. S.* in his lifetime, and from the Defendants as executors since his death, yet, &c. as before. The third count was for money paid by the Plaintiffs to the use of *H. S.*, which he promised to pay. And the fourth for money had and received by the said *H. S.* to the use of the Plaintiffs, which he promised to pay.

Plea, That *H. S.* did not undertake and promise *mode et formâ.*

Verdict for the Plaintiffs damages 800*l.*

Judgment for damages and costs 861*l.* 10*s.* to be levied upon the goods of *H. S.* in the hands of the Defendants, if they have so much to be administered, and if not, 61*l.* 10*s.* to be levied on their own goods. The Defendants below assigned for errors, that the two first counts of the declaration were not sufficient in law for the said Plaintiffs below to have or maintain their aforesaid action thereof against the said Defendants, and for that the contracts and promises in those counts respectively stated are illegal and void; also that by the record it appeared that judgment was given for the Plaintiffs to recover damages against the Defendants upon the whole of the said declaration for the non-performance of all the promises and undertakings in the said declaration mentioned; whereas by the law of the land judgment ought to have been given for the Defendants upon the two first counts of the said declaration against the Plaintiffs; and the Defendants prayed that the judgment for the errors aforesaid and other errors might be reversed.

Joinder in error.

Abbott for the Plaintiffs in error relied upon *Haddam's* case, 3 *Inst.* 197. by which it appears that *Haddam* was fined and imprisoned by the Court of King's Bench in the 25th of *Edward* the third for selling corn in sheaves; and Sir *Edward Coke* makes this remark upon the case, "Observe well this judgment, that it is against the common law

1806.

BRISTOW v. WADDINGTON in Error.

law of *England* to sell corn in sheaves before it is threshed and measured, and the reason thereof seemeth to be, for that by such sale the market in effect is forestalled." With respect to the case of *Grant* v. *Hedding*, *Hardres*, 380. 16 *Car.* 2. where the sale of corn standing is spoken of as legal, it being said by the Court, that "if corn be sold standing the vendee shall pay the tithes," he observed, that the legality of such a sale was not the point in decision, and that if *Haddam's* case were law which established that it was unlawful to sell corn in the sheaf *à fortiori* it must be unlawful to sell it standing; that it could not be contended that the 12 *Geo.* 3. *c.* 71. had taken away the common law upon the subject of forestalling and engrossing, it having been solemnly determined by the Court of King's Bench that it only repealed the statutes therein enumerated in a case where the present Defendant in error was actually convicted of engrossing upon an indictment at common law, *Rex* v. *Waddington*, 1 *East*, 167.; that if there were any particular circumstances which made the contract lawful, it was incumbent upon the plaintiff below to shew the exception, the general rule being against such contracts; that the 11 *Geo.* 2. *c.* 19. *s.* 8. which enabled landlords to distrain growing crops for rent, plainly shewed what was considered as the policy of the law upon this subject; since it provides that the crops shall not be sold till they have been threshed. He further objected, that it was not averred in the declaration that the plaintiffs either requested the Defendants to deliver the hops, or gave notice that he should be ready to receive them at any particular time, or tendered the price; which he contended ought to have been averred, there being no day fixed for the delivery by the contract.

Bolland for the Defendant in error, after referring to *Grant* v. *Hedding*, and also to *Moyle* v. *Ewer*, 2 *Bulstr.* 183. was stopped by

Sir

1806.

BRISTOW v. WADDINGTON in Error.

Sir JAMES MANSFIELD Ch. J. At the time when *Slade's* case (*a*) was determined, namely, 44 *Eliz.*, the statutes of *Edward* the sixth against forestalling and engrossing were in full force. The declaration in that case states that "whereas the Plaintiff on the 10th *November*, 36 *Eliz.* was possessed of a close of land in *H.* containing 8 acres, for a certain term, and being so possessed, the said close aforesaid on the said 10th *Nov.* was sowed with wheat and rye, which wheat and rye on the 8th *May* were grown into ears, the Defendant, in consideration that the Plaintiff at the special instance and request of the Defendant, bargained and sold to him the said blades of wheat and rye growing upon the said close, (the tithes due to the rector, &c. excepted,) did assume and promise to the Plaintiff to pay to him 16*l.* at the Feast of *St John Baptist* then next to come," and for non-payment of this sum the action was brought. A special verdict was found, stating all the facts, and the case was argued twice before the 12 Judges, by the Attorney and Solicitor-General for the Plaintiff, and by *Bacon* and *Dodderidge* for the Defendant; and yet it never entered into the imagination of any one of those learned persons at a time when the statutes of *Edw.* 6. were so recent, that a mere sale of a standing crop was illegal. To render such a purchase illegal, it must be made with an intent to sell again. But nothing of that kind appears in this case. The cases respecting tithes shew the opinion of the Court that such bargains were good: and with respect to *Haddam's* case, it does not follow that because a sale of corn in sheaves is illegal, it is therefore illegal to sell it while standing. The earlier the sale is made, the less liable is it to objection. Persons often feed cattle upon green corn, and it may be bought for that purpose. After the 12 *Geo.* 3. we should expect a precise determination in point to authorize us to hold such a contract against law.

(*a*) 4 *Co.* 91.

With

1806.

BRISTOW v. WADDINGTON, in Error.

With respect to the last objection, I think that the first act was to be done by the vendor.

CHAMBRE J. observed, that if this contract should be deemed illegal, an incoming tenant could not take the crop upon the ground at a valuation without violating the law.

Judgment affirmed.

Bolland then applied to the Court for interest upon the sum recovered from the date of the judgment below; and referred to *Littledale* v. *Lord Lonsdale*, 2 *H. Bl.* 287. (*a*), to shew that it was entirely in the discretion of the Court to allow it or not.

Abbot, contrà, insisted that the action having been brought for mere unliquidated damages, it was quite contrary to the practice of the Court to give interest.

Sir JAMES MANSFIELD Ch. J. observed, that a few days before in an action against a broker who had neglected to effect an insurance, and wherein damages were recovered against him as if he had been the insurer, the Court had allowed interest, and was inclined to grant it in the present instance; but finding that the practice had been against allowing it, he said that it ought not to be altered without notice to the parties; and accordingly the allowance of interest was refused.

(*a*) With respect to this case, it was observed by a gentleman who had been counsel in the cause, that the damages there had been taken by consent, subject to reduction by arbitration; and therefore the Court had considered the amount ascertained by admission.

1806.

RAMSAY *v.* Lord REAY.

Nov. 20th.

Plaintiff is not to sign judgment for want of a plea till the expiration of 2 hours after the delivery of a bill of particulars, though the time for pleading be out, and a demand of a plea given, above 24 hours before that time.

THE declaration in this case was delivered on the 8th of *November*, and a rule to plead given on the same day: a summons for a bill of particulars was then taken out, returnable on the 10th, which was consented to, and an order made on that day; on the 11th a bill of particulars was delivered, with a demand of a plea: on the evening of the 11th a further summons for a better particular was taken out, returnable on the the 12th, and an order made on that day accordingly. On the 13th, at two o'clock in the afternoon, a further particular was delivered; and at seven o'clock in the evening of the same day judgment was signed. The regular time for pleading expired on the morning of the 12th, before the summons of the 11th was returnable. After judgment had been signed, the Defendant having no notice of it obtained a further order for a better particular.

Bayley Serjt. having obtained a rule to shew cause why this judgment should not be set aside,

Williams Serjt. shewed cause, and contended that although an order for a bill of particulars suspends the proceedings till complied with, yet that the Plaintiff is at liberty to sign judgment immediately that he has complied with it: and cited *Hifferman* v. *Langelly*, 2 *Bos. & Pull.* 363. as in point; and observed, that if the Defendant considered the last particular insufficient, he should have immediately applied for a further summons.

But *the Court* thought that the Defendant must have some time to judge of the particular before judgment is signed; they observed, that it appeared in this case that the

1806.

RAMSAY
v.
Lord REAY.

the second particular was insufficient as well as the first; and that in *Hifferman* v. *Langelly* the particular was delivered on one day and judgment signed the next; and said, that twenty-four hours ought to be allowed.

Rule absolute.

Nov. 21st.

DE LA RUE *v.* STEWART.

Debt on bond, conditioned for payment of an annuity of 175*l.* quarterly, during the life of Lady G. Pleas, payment of the annuity at the days, and payment of the arrears after the days in the condition. Replication, that the Defendant did not pay the annuity or the arrears in manner and form as Defendant alleged, but on the contrary Plaintiff suggested that during the life of Lady *G.* 87*l.* 10*s.* for two quarterly payments became due, and was still in arrear, and concluded to the country. On demurrer, the Court seemed to think the replication bad, and gave the Defendant leave to amend on payment of costs.

DEBT on bond for 1800*l.*, dated the 5th of *October* 1799.

The Defendant craved oyer of the bond and condition, by the latter of which it appeared that the bond was given to secure the payment of an annuity of 175*l.* in equal quarterly payments by the Countess Dowager of *Granard* to the Plaintiff during her life. The Defendant then pleaded *non est factum* and afterwards several pleas, alleging that no memorial was inrolled within twenty days, and stating various defects in the memorial, and also that the condition of the bond did not set forth the true consideration. Ninthly, he pleaded that he the Defendant had yearly and every year from the date of the bond until the suing forth the original writ paid the said annuity of 175*l.* in manner and upon the several days and times in and by the condition limited and appointed, and this, &c.; wherefore, &c. Tenthly, he pleaded, that after the several days and times in the condition mentioned, to wit, on the 7th of *January* 1805, he paid to the Plaintiff all arrears of the said annuity of 175*l.* according to the form of the statute.

The Plaintiff, after joining issue on the first plea, replied, that a memorial was enrolled within twenty days, and set it forth, and this, &c. Upon this part of the replication various issues were joined both of law and fact. He also replied, that the condition of the bond did

set

set forth the real consideration upon which issue was joined: and then to the 9th and 10th pleas replied, that the Defendant did not pay or cause to be paid to him the Plaintiff the aforesaid annuity of 175*l.*, or the arrears thereof, or any part thereof, in manner and form as the Defendant alleged; but wholly refused and neglected so to do; and on the contrary thereof the Plaintiff for breach of the said condition suggested and gave the Court to understand and be informed, that after the making of the bond and during the life of the said Countess Dowager of *Granard,* to wit, on, &c. at, &c. a large sum of money, to wit, 87*l.* 10*s.* of the said annuity of 175*l.* for two quarterly payments became due from the Defendant to the Plaintiff, and which said sum of 87*l.* 10*s.* was still in arrear and unpaid to the Plaintiff, contrary to the form and effect of the condition; and this the Plaintiff prayed might be inquired of by the country.

To this replication to the 9th and 10th pleas the Defendant demurred, and shewed for cause that the Plaintiff had not by the replication to the 9th plea assigned any breach at common law of the condition, and also that he had concluded his replication to the country, instead of concluding the same, or so much as related to the ninth plea, with a verification.

Joinder in demurrer.

Best Serjt. in support of the demurrer. The replication in this case ought to have concluded to the Court, and not to the country. Where indeed the bond is conditioned for the payment of a single sum of money, if the Defendant plead *solvit ad diem,* or *solvit post diem,* the Plaintiff may deny the payment, and conclude to th country. But this bond is given to secure several payments at different times, and resembles a bond for performance of covenants, in which case the Plaintiff is bound to shew the specific instance in which the bond has

1806.

DE LA RUE v. STEWART.

has not been complied with; and wherever it is necessary to point out the particular instances of breach, the replication must conclude with a verification. *Hayman* v. *Gerrard*, 1 *Saund.* 99. edit. by Serjt. *Williams*, and the cases cited in the notes. In the present case the suggestion forms a part of the replication, and introduces new matter, namely, the life of Lady *Granard*, and the non-payment of a specific sum of 87*l.* 10*s.* And it was expressly laid down in *Henderson* v. *Withy*, 2 *Term Rep.* 576. that whenever new matter is introduced, the other party must have an opportunity of answering it. In *Cornwallis* v. *Savery*, 2 *Burr.* 772. where to debt on bond with a condition to account, the Defendant pleaded performance, and the Plaintiff replied that the Defendant received several sums of money amounting in the whole to 1400*l*, for which he had not accounted, and concluded with a verification, Lord *Mansfield* said that the conclusion was right, for the replication narrowed the breach to a particular sum, which it specified in certain to be 1400*l.*

Bayley Serjt. was to have argued *e contrà*, but on being questioned by the Court admitted he had never seen such a suggestion as the one in question introduced into a replication: he cited *Sandford* v. *Rogers*, 2 *Wils.* 113. and *Hayman* v. *Gerrard*, 1 *Saund.* 103. by *Williams* Serjt., where in note 1. the cases upon the subject are collected and commented upon.

Sir JAMES MANSFIELD Ch. J then said, that it was doubtful to him whether the replication was not mere nonsense in its present form, and *Chambre J.* added, that he should be sorry to have such a precedent established, and observed, that under the 8 & 9 *W.* 3. *c.* 11. *s.* 8. there was no power of introducing any suggestion on the record, except in the three cases of judgment upon demurrer, by confession or *nil dicit.*

Accordingly

Accordingly the Plaintiff upon these intimations from the Court had leave to amend upon payment of costs.

1806.

DE LA RUE v. STEWART.

POWELL *v.* LAYTON.

Nov. 24th.

To an action on the case in the form of tort against one of several joint owners of a ship for not safely conveying goods which had been delivered to him by the Plaintiff for that purpose, the Defendant may plead in abatement that the goods were delivered to him and his partners jointly, and that his partners are not sued.

THE declaration in this case was as follows: "For that whereas heretofore, to wit, on, &c. at, &c. the said Plaintiff, at the special instance and request of the said Defendant, had caused to be delivered to the said Defendant divers goods and merchandizes, to wit, two tons of pepper of him the said Plaintiff, of the value of 500*l.* to be carried and conveyed by him the said Defendant on board of a certain ship or vessel of the said Defendant called the *General Moore*, then in the river *Thames*, to wit, at, &c. and then bound for parts beyond the seas, to wit, for *Naples* and *Messina*, and there at *Naples* to be delivered in the like good order and well-conditioned, all and every the dangers and accidents of the seas and of navigation of whatever nature or kind soever excepted, unto order, for certain freight to be therefore paid to the said Defendant; and although the said Defendant took and received the said goods and merchandizes to carry, convey, and deliver the same as aforesaid, and although a reasonable time for the carriage and conveyance and delivery thereof had long since elapsed, to wit, at, &c. and although the dangers and accidents of the seas and of navigation of any nature or kind whatsoever did not prevent the carriage, conveyance, and delivery of the same; yet the said Defendant, not regarding his duty, did not within such reasonable time as aforesaid carry, convey, and deliver the said goods and merchandizes, or any part thereof, according to his said duty; but wholly failed and neglected so to do, and so carelessly

1806.

POWELL v. LAYTON.

lessly and negligently behaved and conducted himself in and about the said carriage, conveyance, and delivery of the said goods and merchandizes, that by and through the mere negligence, carelessness, and default of the said Defendant in this behalf the said goods and merchandizes, afterwards, and before the delivery of the same at *Naples* aforesaid, were and are wholly lost, to wit, at, &c. By reason whereof the said Plaintiff not only lost the said goods and merchandizes, and divers large gains and profits which he otherwise would and might have made of the same, but was also put to great loss, expence, and inconvenience from the want of the said goods and merchandizes, to wit, at," &c. There were other counts constructed in the same manner, and varying only in matters not essential to this case.

The Defendant pleaded in abatement, "that the goods and merchandizes mentioned in the declaration (if any such were delivered) were delivered to *Andrew Layton*, since deceased, in his lifetime, and one *Clement Worts*, jointly, they being partners and jointly interested in the said vessel in the said declaration mentioned, and not to the said *Charles Layton* only, as is above alleged, which said *Clement Worts* is still alive in parts beyond the seas, to wit, at, &c. and this, &c. Wherefore, because the said *Clement Worts* is not named in the said writ, the said *Charles Layton* prays judgment of the said writ, and that the same may be quashed."

To this plea the Plaintiff demurred, and the Defendant joined in demurrer.

Bayley Serjt. in support of the demurrer. The question intended to be raised in this case is, Whether to a declaration framed as this is the Defendant be entitled to plead in abatement? There are two kinds of actions of *assumpsit*; one which confines itself to the contract only, and makes the breach of the contract the ground of

of complaint, in which case the money counts may be joined; the other that which founds itself upon the carelessness and breach of duty of the Defendant, with which a count in trover may be joined. The latter being an action on the tort, and not on the contract, the Plaintiff is not bound to sue all the partners. Where several persons are known to be partners, but one only has the conduct of the business, and he is the person sued for his individual negligence, the Plaintiff, though at liberty if he pleases to treat the negligence of one partner as the negligence of all, yet is not bound to do so unless it suits his convenience. The individual partner guilty of the negligence has no right to defend himself on the ground of the joint contract, which has nothing to do with his negligence. If any plea in abatement be admissible to a declaration framed as this is, the form of it should be that the loss sustained by the Plaintiff was not through the negligence of the Defendant only, but through his negligence and that of the other co-contractors. Suppose the plea to have stated that the loss was in consequence of the joint negligence of all the co-contractors, might not the Plaintiff have replied that it was through the several negligence of one. [Sir *James Mansfield* Ch. J. I think not; and certainly such a replication was never known. The case of *Buddle* v. *Wilson*, 6 *Term Rep.* 369. is founded on that of *Boson* v. *Sandford*, of which the fullest statement is to be found in 2 *Show.* 478. *Chambre* J. That case was treated by all the parties as an action on the case, and it is impossible that Lord Ch. Justice *Holt* could have called it *quasi ex contractû* if in truth it was contract.] In *Govett* v. *Radnidge*, 3 *East*, 69. Lord *Ellenborough* considers it to have been an action of *assumpsit*; and in *Mitchell* v. *Tarbutt*, 5 *Term Rep.* 651. Lord *Kenyon* observes, that the case of *Boson* v. *Sandford* was treated by the whole Court

1806.

POWELL v. LAYTON.

as an action for a breach of contract. The case of *Govett* v. *Radnidge* is a most material authority for the Plaintiff, for that was founded in contract, and no actual misfeasance alleged, but only a non-feasance; and yet the Court of King's Bench held that one of three contractors might be found guilty, and the others acquitted. In truth, if a party declare in *assumpsit*, the rules which govern the action of *assumpsit* apply, and he must abide the consequences of those rules; but in this case, which is tort, negligence is the *gravamen*, and not the contract; whereas in *assumpsit* negligence is merely introduced to shew the breach of contract.

Vaughan Serjt. *contrà*. It does not depend upon the form of the declaration whether the action be for a tort or on a contract, but on the nature and cause of the action. In this case it is not denied that contract is the foundation of the action. If, therefore, this action can be turned into an action for a tort, no case of contract can be mentioned which may not be turned into tort; for every non-payment of money in persuance of a contract is as much a breach of duty as a non-delivery of goods. *Mitchell* v. *Tarbutt* was the case of one ship running down another, which being clearly a tort, has no application to this. In that case, and in *Buddle* v. *Wilson*, Lord *Kenyon* had the case of *Boson* v. *Sandford* brought before him, and he states in the former case that the result of *Boson* v. *Sandford* is, that where the cause of action arises *ex contractû* all the co-contractors must be sued; but where it arises *ex delicto*, all or any one of them may be sued. In *Buddle v. Wilson* (from the plea in which case this was drawn) Lord *Kenyon* said he had looked into the cases, and he referred to Mr. Justice *Dennison's* opinion in *Dale* v. *Hall*, 1 *Wils.* 282. who says, "in the old forms it is that the Defendant *suscepit super se*, which

which shews that it is *ex contractú*." Until the decision of *Govett* v. *Radnidge* in the King's Bench the authorities on the subject were uniform and unimpeached.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Sir JAMES MANSFIELD Ch. J. The question upon this demurrer is, whether in this action, and upon a declaration framed as this is, the Defendant who is sued alone has a right to plead in abatement that he is only liable jointly with his partners? The substance of the declaration is, that he received the goods to carry for freight. It seems to be admitted, nor indeed can there be any doubt on that head, that if this action is founded in contract the plea in abatement is good. Now on reading this declaration does it not clearly appear that it is founded on contract? Although the word *suscepit* is not used in the declaration, yet the nature of the charge is, that the Defendant agreed to carry the goods to *Sicily*, and has failed in the performance of his agreement. Can it then make any substantial difference that the word *suscepit* is not used? If it does make no difference the plea is good, and the demurrer cannot be sustained. The word "duty" is introduced into this declaration; but let us see what is meant by the Defendant's duty. How did he undertake any duty, except by his agreement to carry and deliver the goods? The duty of a servant or the duty of an officer I understand, but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract. Suppose a man to undertake to supply me as a builder with timber and other materials for building, he imposes on himself the duty of performing his contract, but no other duty, and I may maintain an action against him for a breach of the contract, which in that sense will be a breach of duty.

1806.

POWELL v. LAYTON.

It was argued at the bar on the difference supposed to exist with respect to their liability between partners acting in the business, and partners not acting. It was contended, that where one partner only acts, his negligence will be the ground of an action against him. That may be true as between him and his partners, but to the Plaintiff it matters not whether one or all the partners were negligent, the default of one partner being the default of all *quoad* those with whom they contract. The duty of one is the duty of all, *viz.* to carry the goods and deliver them. Whether such be the nature of this action or not may be tried by the consequences. I suppose there can be no doubt, and indeed it is so stated by Lord *Mansfield* in *Hambly* v. *Trott*, *Cowp.* 375. that if a common carrier accept goods to carry and then die, an action will lie against his executor. How is that? Why, because the action is founded on contract. Indeed Lord *Mansfield* says, it must not be an action on the custom of the realm, which would be in tort, but it must be an action of contract. But the form of the action cannot alter the nature of the transaction; the form of the transaction is originally contract, and the circumstance of an action lying against the executor of the carrier shews that it is contract. How an action against a carrier on the custom ever came to be considered an action in tort I do not understand, but it is so considered, and a count in trover is joined with it; and yet, though the non-performance of that which is originally contract may be made the subject of an action of tort, the foundation of that action must still be contract. In *Dale* v. *Hall*, 1 *Wils.* 282. Mr. Justice *Dennison* considers the action against the carrier as founded in contract, and that the circumstance of the *suscepit* being omitted or introduced into the declaration makes no difference. Can there be any doubt, that in case of a loss of goods either by the master or any other person, (subject to the question of negligence

negligence as between themselves) and a payment of the whole loss by one partner, that he would be entitled to contribution against his copartners? If that be so, it is decisive to shew, that though by the breach of his contract the carrier is liable to an action, yet that such action must be founded on contract; for in *Merryweather* v. *Nixon*, 8 *Term Rep.* 186. it was ruled by Mr. Baron *Thompson*, and his opinion was confirmed by the Court of King's Bench, that no action for contribution could be sustained as between two Defendants found guilty of a tort where the damages had been paid by one. If then this action be founded in contract, why may not this plea in abatement be used? It is true, that a plea in abatement usually meets with no favour as being a dilatory plea, yet it is not in all cases a mere dilatory plea, but may be necessary to the due protection of a Defendant. It is material to him in this case, because if a verdict be obtained against all the partners, it is at least *primâ facie* evidence that they are all liable to contribution, and it precludes any of them from resisting contribution on the ground that there was not a full and fair defence to the action. Whereas if the recovery be against one partner only, he must prove the partnership, and the accident, and many other circumstances, before he can obtain contribution. It would therefore be a great hardship to deprive him of this plea, and it would be a great absurdity to restrain the right of the Defendant to make the Plaintiff join his partners in the action, merely because the Plaintiff has chosen to call an action of contract an action of tort. Had there been no cases decided upon this subject, such I confess would have been my opinion; but in truth there are several old and long-established authorities in support of that opinion. The leading authority upon the subject is the case of *Boson* v. *Sandford* which is reported in *Salkeld*, *Levinz*, *Shower*, *Comberbach*, and 3 *Modern*; in none of which books is there a doubt thrown out respecting the propriety of the decision.

1806.

POWELL v. LAYTON.

That case is also mentioned by Lord Chief Baron *Comyn* in his *Digest*, tit. *Abatement*, (F. s.) *Joint Contractors*, (which shews he thought it a case of joint contract); and again in the same Digest, under title *action upon the case for negligence*, (C) *action against a common carrier* in which latter place he says, "but all the part-owners must be joined. So in *Danvers'* *Abridgment*, p. 8. under title *Action*, it is referred to as law. Besides these confirmations to which I have alluded, Mr. Justice *Dennison*, in the case of *Dale* v. *Hall*, approves the case of *Boson* v. *Sandford*; and in *Mitchell* v. *Tarbutt* the Court of King's Bench seemed to consider it law, though distinguishable from the case then in judgment, which was clearly a case of tort. Then followed the case of *Buddle* v. *Wilson*, which was as solemnly decided as a case could be, and though this point did not necessarily come in judgment at last, yet it was argued, and what fell from the Court upon it I must consider as no small authority in support of the plea. Thus far therefore the cases confirm the decision of *Boson* v. *Sandford*. But there is a late case of *Govett* v. *Radnidge* in the King's Bench which is hardly distinguishable from the present, though I hope, as it does not seem to accord with the opinion we entertain in this case, it is to be distinguished, on account of the great respect due to those by whom it was decided. Much argument is introduced into that case to shew that *Boson* v. *Sandford* is not to be relied upon; but I do not think it is successfully impeached. Some stress is laid on the circumstance that three of the Judges were mistaken in supposing that the joint contract could not be pleaded in abatement; but it must be remembered, that till the case of *Rice* v. *Shute*, 5 *Bur.* 2611. such a plea was not used. It is true that Lord Chief Justice *De Grey* in *Abbot* v. *Smith*, 2 *Bl.* 947. says, that the rule laid down in *Rice* v. *Shute* is not novel, and refers to some cases in the year books, most of which are to be found *Comyns'* *Abridgment*, tit. *Abatement* (E. 12)

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Joint Contractors. But these are cases of debt on simple contract, which was the usual mode of declaring previous to *Slade*'s case. It is indeed rather singular when the action of *assumpsit* was substituted for the action of debt, that a plea in abatement was not also immediately introduced for that form of action; but it was not. Probably on the notion that a contract with two was not the same contract as that declared upon with one only, and therefore to be taken advantage of upon the evidence. However, at the time of *Boson* v. *Sandford* such a plea was not known in *assumpsit*, nor was it used till after the case of *Rice* v. *Shute*. It can hardly be said, therefore, that the Judges in *Boson* v. *Sandford* were mistaken, who thought, as all Judges before them had thought, and as all Judges continued to think till the decision of the case of *Rice* v. *Shute*. I am old enough to remember that the decision in *Rice* v. *Shute* caused great surprize in *Westminster Hall*; for before that case there had been an infinite number of nonsuits on the ground that other joint contractors should have been sued. It does not appear to me, therefore, that it should be imputed to the Judges who decided *Boson* v. *Sandford* that they mistook the law. Upon the whole it appears to me that this action is founded on breach of contract; that it is not distinguishable from any other action founded on contract; and that the Defendant is no more guilty of a breach of duty than every other person is who fails to perform his contract. We think, therefore, that the demurrer in this case cannot prevail, and that there must be judgment for the Defendant.

Judgment for the Defendant.

The Lord Chief Justice then observed, that he had omitted to notice the case of *Dicken* v. *Clifton*, 2 *Wils.* 319., which, he said, had decided that a count against a carrier on the custom may be joined with a count in trover;

1806.

POWELL v. LAYTON.

trover; a point that had long been *vexata quæstio*; but that decided nothing that applied to the case in judgment. He added, that it was imputed to the Chief Justice in the report of that case to have said, that it depends merely on the judgment whether any two counts may or may not be joined; whereas in truth it depends not on the judgment only, but on the form of the plea also.

Nov. 25th.

DE SYMONDS *v.* DE LA COUR.

In an action on a policy of insurance on goods from *London* to *Emden*, where the ship was lost by putting into the *Texel*; held, the captain, as part-owner of the ship, was a competent witness to prove that the ship originally sailed on the voyage insured by the direction of the owners of the goods, though not to prove that the deviation was justified by necessity.

THIS was an action on a policy of insurance upon goods on a voyage from *London* to *Emden*.

At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* Sittings after last *Trinity* term, it appeared that the ship having sailed from *London*, met with difficulties in her voyage, and put into the *Texel*, and was taken possession of by the *Dutch*. The defence set up was, that the goods were originally destined for the *Texel*, and not for *Emden*. To prove that *Emden* was the real destination of the ship, and that the ship sailed for that place by the direction of the owners of the goods, the Plaintiffs called the captain, who was a part-owner of the ship. On the part of the Defendant it was objected that he was not admissible: but the Chief Justice over-ruled the objection, and a verdict was found for the Plaintiff.

A rule *Nisi* for setting aside this verdict having been obtained,

Best Serjt. was now called upon to support the rule; he contended that the Plaintiffs were bound to make out that the ship sailed upon the voyage insured; and as the ship had in fact deviated from that course, that she was driven into the *Texel* by necessity; that if the ship had deviated

deviated from the voyage unnecessarily, the owners of the ship were answerable to the owners of the goods, and consequently that the captain, being a part-owner, had a direct interest.

Sir JAMES MANSFIELD Ch. J. The sole question at the trial was, Whether *Emden* or the *Texel* was the original destination of the ship? There was no question about deviation. It is true that he was asked in cross-examination, whether it would not have been more convenient to return to *England*; but the object of that was to shew that the *Texel* must have been the original destination. The sole view with which the captain was examined was to shew what was the original destination, and that was the only question left to the jury. If the question had turned on a deviation the captain could not have been examined. But here he acted under the direction of the owners of the goods: if the destination of the ship had been put in issue by a special plea, there can be no doubt that he would have been a competent witness. Considering, therefore, that this was the only real question raised, I do not think that the interest of the captain could be affected by the decision of the cause.

ROOKE J. I have had some doubts upon this case, but considering that the captain acted as the agent of the owners of the goods, and with their knowledge, I think that they could have no action against him, and that he was therefore admissible.

CHAMBRE J. Of the same opinion.

Shepherd and *Bayley* Serjts. for the Plaintiff.

Rule discharged.

1806.

Nov. 27th.

WILLOWS *v.* BALL.

Defendant having recovered a verdict against the sheriff for seizing his goods under a *distringas* in an action at the suit of *J. S.* and having given a *cognovit* to the Plaintiff, on which a *fi. fa.* issued, the Court refused to order the sheriff to pay over the damages recovered by Defendant against him to the Plaintiff in satisfaction of the *fi. fa.*

THIS was an application, calling upon the Defendant to shew cause why the late sheriff of *Middlesex* should not retain in his hands the amount of the damages recovered by the Defendant against him in discharge of the Plaintiff's execution issued in this cause, and why he should not pay the same over to the Plaintiff in this cause in discharge thereof. The application was founded upon an affidavit disclosing the following facts:

Willows the Plaintiff being a creditor of *Ball* the Defendant for goods sold, *Ball* had given him a *cognovit* for the debt to the amount of 1350*l.* One *Bowen*, a creditor of Mrs. *Noel*, a married woman, (with whom *Ball* was supposed to live) had issued a *distringas* and seized the goods of *Ball* as the goods of Mr. *Noel*, the husband of Mrs. *Noel*. *Ball* brought an action against the sheriff, who pleaded the seizure under the *distringas*, and that the goods were Mr. *Noel's*. On this issue joined, the jury found a verdict for *Ball*, for the amount of the goods. *Willows*, after the seizure of the goods under the *distringas*, lodged a *fi. fa.* against the goods of *Ball* in the sheriff's hands, and prayed that the sheriff might pay over the money recovered by *Ball* against him in satisfaction of the *fi. fa.* lodged by him, *Willows*, with the sheriff against the goods of *Ball*.

Shepherd and *Bayley* Serjts. shewed cause, insisting that the debt or the money of an individual could not be taken in execution in the hands of a third person, and referred to the case of *Fieldhouse* v. *Croft*, 4 *East*, 510. where the Court of King's Bench had refused an application of this kind; they observed, that supposing the money sought to be retained in the hands of the sheriff, to have been the

the individual debt of the sheriff instead of being the debt of a third person, the Court would not have attended to the application.

Cockell and *Best* Serjts, opposed the rule on behalf of the sheriff.

Vaughan and *Onslow* Serjts. in support of the motion observed, that it was a mere question whether the Court had or had not the power to allow this application ; and to shew they had, cited the case of *Armistead* v. *Philpot*, *Doug.* 231. where the Court of King's Bench had directed the sheriff to retain a sum of money levied for the Defendant in another action (in which he was Pltintiff) in order to satisfy a demand of the Plaintiff in that action, there being no goods of the Defendant upon which the sheriff could levy : they admitted however that in that case the application was only so far oposed as to secure to the attorney in the cause in which the money had been levied the payment of his bill.

Sir JAMES MANSFIELD Ch. J. The case of *Armistead* v. *Philpot* has no weight, because the application there was not resisted. If it were possible for us to secure to *Willows* the goods, or the money produced by the sale of those goods, I should be very glad to assist him. And if I thought a court of equity could assist him where we cannot, I should be disposed to direct the money to be retained 'till he has had an opportunity of applying to a court of equity. The goods in question being the goods of Mr. *Ball*, were liable to be taken in execution by any other creditor as well as *Willows*, though they appear to have been the very goods furnished by *Willows*. They were taken wrongfully under the *distringas* by *Bowen*, and now *Willows* has lodged a *fi. fa.* against the goods of *Ball* upon the *cognovit*. We can neither assist nor hinder

1806.

WILLOWS v. BALL.

hinder him, if he chuses to take the goods of *Ball*; but considering the goods in question as turned into money, and the money to belong to *Ball*, I can see no distinction between that money so due from the sheriff to *Ball*, and any other debt due from the sheriff to him. Suppose a steward having money in his hands belonging to his master, and that steward to be the sheriff, could we order him to pay over that money to a creditor of his master? If *Willows* had a lien on the goods, that might vary the case.

The other Judges concurring,

Rule discharged.

Nov. 28th.

COVINGTON *v.* ROBERTS.

If a ship, in order to escape from a privateer, carry an unusal press of sail, and succeed in getting away, but sustain damage in so doing, this is a particular not a general average.

THIS was an action on a policy of insurance brought by the owners of the brig *Nancy* against one of the underwriters upon the ship to recover a particular average loss. The Defendant paid 4*l.* into court.

At the trial before Sir *James Mansfield* Ch. J. at the *Guildall* Sittings after last *Trinity* term, it appeared that the *Nancy* was captured by a *French* privateer; but that on account of a heavy gale, and the sea running high, the privateer could not take possession of her; that the *Nancy*, in order to escape from the privateer, carried an unusual press of sail, in consequence of which she was much strained, opened most of her seams, and carried away the head of her mainmast; but finally succeeded in getting away. A verdict was taken for 100*l.*, subject to the award of an arbitrator, who was to "ascertain the amount of the average between the parties."

On a former day in this term a rule was obtained, calling on the Plaintiff to shew cause, why the order of reference should not be amended by inserting the word "general"

"general" before the word "average," the Defendant contending that he was only liable to a general average.

Shepherd Serjt. in support of the rule, contended, that as the injury to the ship had been occasioned by an exertion to save the whole concern, the damage ought to be borne equally by the owners of the ship and cargo; and he referred to *Birkley* v. *Presgrave*, 1 *East*, 220., where Lord *Kenyon* says, "All the articles which were made use of by the master and crew upon the particular emergency, and out of the usual course for the benefit of the whole concern, and the other expences incurred, must be paid proportionably by the Defendant as general average."

Sir JAMES MANSFIELD Ch. J. In the case referred to there was an article given up for the benefit of the whole concern. A cable was sacrificed. The language of Mr. Justice *Lawrence* is, that all loss which arises in consequence of extraordinary *sacrifices* or expences incurred for the preservation of the ship and cargo come within the description of general average, This is only a common sea risk. If the weather had been rather better, or the ship stronger, nothing might have happened. The word "particular" may be inserted in the order.

Per Curiam Rule discharged.

Mr. Justice *Heath* was absent during the whole Term, from indisposition.

In last *Easter* Term Mr. Serjt. *Lens* and Mr. Serjt. *Best* were promoted to the rank of King's Serjeants.

END OF MICHAELMAS TERM.

CASES

1806. ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

In the Forty-seventh Year of the Reign of GEORGE III.

Jan. 24th.

BURFIELD *v.* DUCHESSE DE PIENNE.

The Court refused to discharge a Defendant on the ground of coverture, she being a foreigner, and her husband abroad, though she was not separated from him by deed, had no separate maintenance, nor had ever represented herself as a single woman.

SHEPHERD Serjt. moved for a rule to shew cause why the Defendant, who had been arrested on the 12th of *January* for a debt of 15*l.* should not be discharged on a common appearance.

The affidavit in support of the application stated that the Defendant in the year 1791 was married to the *Duc de Pienne*; that they came to *England* together on account of the troubles in *France*, and resided there till *April* 1803, when the Duke went to *Warsaw* to attend *Louis* the Eighteenth as Lord of the Bedchamber, whom he afterwards accompanied to *Sweeden*, and that he was then at *Malmo*; that the Defendant remained in *England* for her personal safety, with the consent and privity of her husband, with whom she constantly corresponded; that she

she had always gone by the name of the *Duchesse de Pienne*; that she was never separated from her husband by any deed, nor had any separate maintenance; that she had never represented herself as a single woman; that she believed the Plaintiff knew her to be married at the time when the debt was contracted, and that for ought she knew the Duke might speedily return to *England*.

Shepherd Serjt. cited *Pitt* v. *Thompson*, 1 *East*, 16. where the Court discharged a married woman who at the time when the debt was contracted had mistakenly stated that her husband was dead, on the ground of there being no intention in the Defendant to impose upon the Plaintiff; and *March* v. *Cappelli*, *Hil.* 39 *Geo.* 3. 1 *East*, 17. *in notis*, where a similar application was granted, because the Plaintiff knew the Defendant had a husband living abroad, though under terms of separation from her. He said that the question in these cases always was, Whether the Defendant had imposed herself upon the Plaintiff as a single woman? That in the case of *De Gaillon* v. *L'Aigle*, 1 *Bos. & Pull.* 8. the Defendant had carried on a separate trade upon her own account, which distinguished it from this case: and he referred to *Marshall* v. *Mary Rutton*, 8 *Term Rep.* 545. where it was determined that a woman living apart from her husband upon a separate maintenance is not liable for her own debts.

HEATH J. In the case of *Pitt* v. *Thompson* the Defendant was an *Englishwoman*. The case of *March* v. *Capelli* is a very loose note. In *Deerly* v. *The Dutchess of Mazarine*, 2 *Salk.* 646. where a verdict was found against the Dutchess, the Court refused to relieve her, though her coverture was clearly proved; and if there be any case in modern times more recognised than another it is that case. If you can distinguish this case from that you may move it again.

1807.

BURFIELD v. Duchesse de PIENNE.

Shepherd took nothing by his motion (*a*).

(*a*) Vide *Walford* v. Duchesse de *Pienne*, 2 *Esp. N. P. Cas.* 544. where the same Defendant was held liable for her debts.

Jan. 24th.

CHAPMAN *v.* PARTRIDGE.

Plaintiff having obtained a verdict, the Court granted a new trial, directing that the "costs of the former trial should abide the event of the new trial." On the second trial the verdict was for the Defendant. Held that the Defendant was only entitled to the costs of the second trial.

THE Plaintiff in this case having obtained a verdict, a new trial was granted, and the Court directed that the costs of the former trial should abide the event of the new trial. On the second trial the Defendant obtained a verdict, and the Prothonotary in taxing costs having allowed the Defendant the costs of both trials,

Bayley Serjt. moved for a rule to shew cause why the Prothonotary should not be directed to review his taxation, contending that the Defendant was only entitled to the costs of the second trial.

Best Serjt. shewed cause in the first instance, and insisted that the Defendant was entitled to the costs of both trials. That in the Common Pleas, where the same party succeeds upon both trials he gets the costs of both, though in the King's Bench it is otherwise. That the Defendant therefore, without the special words of the rule would have been entitled to the costs of the second trial, and that the intention of the rule must have been to give all the costs to that party who should be ultimately entitled to the judgment of the Court; and he referred to *Rouse* v. *Bardin*, 1 *H. Bl.* 639.

The *Court*, however, thought that the words of the rule ought to be construed with reference to the question which must have been depending, namely, whether the new

new trial should be granted upon payment of the costs of the first by the Defendant, and that it was contrary to reason and justice to call upon the Plaintiff who had succeeded on the first trial to pay the costs of it.

Rule absolute.

1807.

CHAPMAN v. PARTRIDGE.

GOODTITLE, on the several Demises of THOMAS CASTLE and ELIZABETH VINCENT Spinster, *v.* ROBERT WHITE.

Feb. 4th.

Devise of all the testator's real and personal estate and effects to *B. V.* his wife, in trust for the education of his daughter *M. V.* till 21, and in case of the death of his daughter before 21, the whole of his said estate and effects to his wife. Testator died leaving *B. V.* his wife, and *M. V.* his only child. *B. V.* died, leaving *M. V.* also her only child, and then *M. V.* died under age and without issue. Held that the heir of *M. V.* *ex parte maternâ* was entitled to succeed.

THIS ejectment brought to recover possession of certain premises lying in the county of *Wilts*, came on to be tried at the Summer Assizes at *Salisbury*, 1806, before *Chambre* J., when a verdict was taken for the lessor of the Plaintiff on the count on the demise of *Elizabeth Vincent*, subject to the opinion of this court on the following case.

On the 24th *October* 1798, *Maurice Vincent* being seised in fee of the premises in question, made his will of this date, which was duly executed in the presence of and attested by three witnesses. In this will there was contained the following devise, "After payment of all my just debts and funeral charges, I hereby give, devise, and bequeath, unto my beloved wife *Barbara Vincent* all and singular my real and personal estate and effects, whether freehold, copyhold, or leasehold, bonds, book debts, mortgages, bills, household furniture, money in the funds, or any other property of whatsoever kind, or wherever it may be, that I now am possessed of or may be entitled to, in trust nevertheless for the education and maintenance of my only daughter *Mary Vincent* till she arrives at the age of 21 years; and in case of the death of my said daughter before she arrives at the age of 21 years, I hereby give and devise the whole of my

1807.

GOODTITLE v. WHITE.

said estates and effects unto my said wife. I hereby nominate and appoint my said wife *Barbara Vincent* and *John Hawkins* of *Down Ampney* executors of this my will and testament. I order and direct that the sum of 30*l.*—(being a sum before mentioned) should be paid o the said *John Hawkins* for his trouble in the execution of this trust.—"

The testator died in the year 1790, shortly after making his will, leaving his said wife *Barbara* and his said daughter *Mary*, who was his only child and heir at law, both surviving him. *Barbara Vincent*, the testator's widow, died intestate in the lifetime of the said *Mary Vincent* the testator's daughter, and the daughter was also the only child and heir at law of her mother. *Mary Vincent* the daughter died 2d *November* 1802, without having attained her age of 21 years, having been after her mother's death by her guardian in receipt of the rents of the premises. The daughter left one of the lessors of the Plaintiff, *Elizabeth Vincent*, (who is the only child of *James Vincent* the brother of *Maurice Vincent* the testator) her paternal heir at law, and also heir at law of the testator. The Defendant claimed title as heir of *Mary Vincent* the daughter *ex parte maternâ.*

The question for the opinion of the Court was, Whether the Defendant as such maternal heir at law of the said *Mary Vincent* the daughter, or *Elizabeth Vincent* as such paternal heir, was entitled?

Lens Serjt. for the Plaintiff. The Defendant claims as heir *ex parte maternâ.* The question will be, whether under the will of the testator the whole estate vested in *Barbara Vincent* the wife, or whether it be divisible in consequence of the bequest to his daughter upon a contingency which has not happened? The case of *Goodright on the Demise of Larmer* v. *Searle*, 2 *Wils.* 29. is certainly

1807.

GOODTITLE
v.
WHITE.

certainly against the Plaintiff, but it is with a view of questioning that decision, and shewing that it proceeds on wrong grounds, that this case is now brought before the Court. In that case the devise was to *George Paynter* in fee, "but if he happen to die before he attain the age of 21 years leaving no issue," then to *Catherine Paynter* in fee; *George Paynter* was the only son and heir of the testator; *Catherine Paynter* was his mother; both survived the testator, but *Catherine* died the day before *George*, who did not attain the age of 21, and had no issue. The circumstances of the two cases are undoubtedly very similar, and though no express judgment was pronounced by the Court, yet the Judges intimated an opinion on the first argument in favour of the Defendant, who claimed under *Catherine Paynter*, and, the reporter adds, were ready to have given judgment for the Defendant, had not the cause been compromised. But whatever might be the opinion of the Judges upon that case, still it was not so decided as to afford the Defendant an opportunity of having that judgment revised upon a writ of error. What was said by the Judges about merger in that case does not apply here, there being clearly nothing like a merger. Here the two estates came into the hands of the daughter, and no disunion of these estates afterwards took place. If a contrary opinion were to prevail, it would contradict the principle that estates of a different nature coalesce in the hands of one and the same person, however distinct those estates may be when in the hands of several persons. Upon the death of *Barbara Vincent* the mother her contingent or executory interest descended to her daughter, and so the two several estates created by the will of the testator vesting in one person, the contingent or executory estate from that moment ceased to exist. The object of the testator being to transfer the whole estate over, that object could not be attained without creating

1807.

GOODTITLE v. WHITE.

the executory devise in favour of *Barbara Vincent* the mother; but that executory devise need not be kept alive when no longer necessary to the purposes for which it was created. In *Goodright* d. *Alston* v. *Wells*, *Doug.* 771. it was decided that where a legal estate in fee and an equitable estate in fee descend upon the same person, the one estate coming *ex parte paternâ* and the other *ex parte maternâ*, the equitable estate merges in the legal estate, and both follow the line through which the legal estate descends. [*Chambre J.* How do you prove the union of the two estates in this case? The moment one begins, the other ceases.] It cannot be denied that executory devises may be disposed of like all other estates; the last doubt upon the subject was, whether they were devisable? But in *Jones* v. *Perry*, 3 *Term Rep.* 55. it was resolved that they were. They may also be estopped by a fine. *Weale* v. *Lower*, *Pollexf.* 24. But in this case the court may consider that the executory estate was virtually released when in the hands of the daughter *Mary Vincent*, together with that estate which had been devised to her; for a release may operate like a remitter, and so the party in whom for the time both estates centered may be remitted to the better title. If the estate to be released had been outstanding in the hands of a third person, there can be no doubt that such third person might have released it; then in this case, where there is no third person to release, the two estates uniting in one person, the effect of that union may be considered *quasi* a release. It may be resembled to the case of an extinguishment of services by which an estate is holden in consequence of the superior and inferior estate uniting in one and the same person. So if a condition devolves on a person who has the estate to which the condition is annexed, the condition becomes extinct, because no distinction can any longer exist between the two. The principle upon which all this proceeds is, that a man cannot

cannot have more than the whole estate; a principle which will apply equally to this case of an executory devise as it would to a power attending an estate, which ceases to be a power that the party can execute if he gets the whole estate, for the power is then lost in the fee. And yet the power is neither merged nor extinguished; for it is not part of the estate, but a mere incident or bare authority in the person enjoying the estate. *Littleton*, § 561. says, "but where the tenant hath as great and as high estate in the tenements as the lord hath in the seignory, in such case, if the lord grant the services to the tenent in fee, this shall enure by way of extinguishment. *Causa patet.*" It is no longer for the interest of any one to keep the estates distinct; as here it is no longer necessary to encumber the estate with these consequences which may result from the happening of the event to which the testator looked. It is true that the case of *Goodright d. Larmer* v. *Searle* was countenanced by Lord *Alvanley* in his judgment in *Doe d. Andrew* v. *Hutton*, 3 *Bos. & Pul* 655. But then it may be observed that it was not material as an authority to the decision of that case, which turned on the circumstance of their being a contingent estate interposed before the commencement of the other contingent estate in fee. Besides, *Goodright* v. *Searle* was only there cited by way of elucidation, and except in that case has hitherto passed *sub silentio*. *In fictione juris subsistit æquitas* is a maxim upon which the technical rules of law are supported, but here no equity requires that two estates should be kept distinct which may have coalesced by release, or by that which amounts to release, under the circumstances of this case.

Bayley Serjt., who was to have argued on the other side, was stopped by Court.

1807.

GOODTITLE v. WHITE.

HEATH J. We are perfectly satisfied with the decision of *Goodright d. Larmer* v. *Searle*, and with the reasons which the Court intimated on the first argument as directing their judgment in that case. The question here is, Whether *Barbara Vincent* the mother took this estate by purchase? for if so, it will vest in her heir by such purchase. There is no ground for the argument that has been urged of a union of the two estates; for the moment that the estate devised to the mother vested, it was discharged of the estate which had been created in favour of the daughter. In this case, therefore, the heir *ex parte maternâ* must succeed. It has been resembled to the case of a power annexed to a fee; but here there was only one fee, and that vested under the will in *arbara Vincent* the mother.

ROOKE J. I am of the same opinion.

CHAMBRE J. There seems to me to be no pretence for impeaching the authority of *Goodright d. Larmer* v. *Searle*, and if it were *res integra* I think we should come to the same decision. The moment one estate commences, under this will, the other ceases. In deciding *Goodright* v. *Searle*, I think the Court had recourse to no subtlety, but that we should adopt subtleties if we were to decide in a different way. In addition to which it seems to me that we should defeat the intention of the testator; for I think it clear that he intended the estate to go to the maternal heirs of his daughter, who died before she attained the age of 21.

Judgment for the Defendant.

1807.

HODGSON *v.* THOMAS RICKARD, JOHN KITCHINMAN, and WM. CHAMBERS.

Feb. 4th.

If a person carrying on within a borough one of the trades mentioned in the 1 *Jac.* 1. c. 22. *viz.* that if a cutter and worker of leather, expose to sale shoes manufactured without the borough, and purchased by him ready made, the searchers may seize them under s. 32. if made of leather insufficiently tanned.

TRESPASS for seizing, taking, and carrying away divers large quantities of shoes belonging to the Plaintiff, and converting and disposing thereof at *Doncaster* in the county of *York*.

The Defendant pleaded, 1st, not guilty; 2dly, as to the seizing, taking, and carrying away twelve pair of shoes, parcel of the said shoes, "that the borough and soke of *Doncaster* now is, and at the time when, &c. and also at the time of making a certain act of parliament, made at a sessions held at *Westminster* in the county of *Middlesex* on the 19th day of *March* in the first year of the reign of our lord *James* the First, late king of *England*, entitled 'An act concerning tanners, curriers, and shoemakers, and other artificers occupying the cutting of leather,' was an ancient borough and soke of this kingdom, out of the circuit or compass of three miles of the city of *London*, and that one *Thomas Rimington*, before the said time, when, &c. in the said declaration mentioned, to wit, on the 12th day of *August* 1805, and from thence until and after the said time, when, &c. in the said declaration mentioned, was mayor of the said borough and soke of *Doncaster* aforesaid, and the said *Thomas*, *John Kitchinman*, and *William*, further say, that they being of the most honest and skilful men for that purpose within the liberty of the said borough and soke, and within the time when, &c. to wit, on the 12th day of *August* 1805, at *Doncaster* aforesaid, according to the directions of that statute, were duly appointed by the said *Thomas Rimington* so then being mayor of the said borough and soke, leather searchers to search and examine all boots and shoes and other wares made of tanned leather,

1807.

HODGSON v. RICKARD and Others.

leather, and brought to be sold or exposed to sale within the said borough, the precints and liberties thereof, for the year ensuing, and the said *Thomas, John Kitchinman* and *William* were then and there sworn by the said *Thomas Rimington* to do and execute their office duly according to the form of the said statute, by virtue whereof the said *Thomas, John Kitchinman,* and *William,* became and were, and continued leather searchers as aforesaid from thenceforth until upon and after the said 1st day of *October* 1805, in the said declaration abovementioned; and the said *Thomas, John Kitchinman* and *William,* further say, that the said *John Hodgson,* after the feast of *St. Bartholomew* mentioned in the said statute, and before the said time, when, &c to wit, on the same day and year in the said declaration mentioned, at *Doncaster* aforesaid, and within the precints of the same borough and soke and the liberties thereof (the said *John Hodgson* then and there using and occupying the mystery or occupation of an artificer using, cutting, and working of leather) did shew forth and expose to sale in a certain place there, in which the said *John Hodgson* did then and there use and occupy the occupation of an artificer using, cutting, and working of leather, a certain parcel of shoes made of tanned leather, to wit, twelve pair of shoes, whereupon the said *Thomas, John Kitchinman,* and *William,* so then and there being such searchers as aforesaid, to wit, on the same day and year last aforesaid, at *Doncaster* aforesaid, did make search in the said place where the said *John Hodgson* did so occupy the occupation of an artificer using, cutting, and working of leather as aforesaid, and did then and there inspect and examine the said shoes so as aforesaid shewn forth and exposed to sale; and the said *Thomas, John Kitchinman,* and *William,* further say, that in certain of the same shoes, to wit, in twelve pair thereof, there was then and there used and put certain leather that was then and there

1807.

HODGSON c. RICKARD and Others.

there not sufficiently tanned and curried, to wit, in the upper-leather of the same shoes, contrary to the form of the statute aforesaid; whereupon they the said *Thomas*, *John Kitchinman*, and *William*, then and there finding the said twelve pair of shoes to be insufficient; for the cause aforesaid, by virtue of the statute aforesaid, and in the execution of the said office, took, carried away, and seized the same twelve pair of shoes, and detained them in their custody until they might be duly tried in manner and form as is directed and appointed by the said statute, as it was lawful for them to do; and the said *Thomas*, *John Kitchinman*, and *William* further say, that within a reasonable and convenient time after the taking and seizing the same twelve pair of shoes, to wit, on the same day and year last aforesaid, at *Doncaster* aforesaid they gave notice to the said *Thomas Rimington*, then being mayor of the said borough and soke of *Doncaster*, of their having so seized and taken the said twelve pair of shoes as aforesaid, for the cause aforesaid, in order that the said *Thomas Rimington* might in due manner appoint triers for trying the same, according to the same statute, which is the same trespass in the instructory part of this plea mentioned; and this, *&c.* Wherefore, *&c.* 3dly, That the Plaintiff "had in his possession and custody in a certain place in which the Plaintiff did then and there occupy the occupation of an artificer using, cutting, and working leather as aforesaid, a certain parcel of shoes," proceeding as in the 2d plea to allege the search by the Defendants as searchers, that the shoes were not sufficiently tanned and curried, and the seizure in order that they might be tried.

The Plaintiff joined issue on the plea of not guilty, and replied to the 2d plea, "that the said twelve pair of shoes in the said plea of the said Defendant secondly above pleaded in bar, and thereby stated to have been shewed forth and exposed to sale by him the said Plaintiff

1807.

HODGSON v. RICKARD and Others.

tiff, in the said place in that plea mentioned, were not, nor were any of them made, wrought, or manufactured by him the said Plaintiff, neither were they, nor were any of them made, wrought, or manufactured within the said borough and soke of *Doncaster* in that plea mentioned, or the precincts or liberties thereof; but on the contrary thereof the said twelve pair of shoes in that plea mentioned were purchased by him the said Plaintiff after they had been made, wrought, and manufactured at a certain place far distant from the said borough and soke of *Doncaster*, to wit, at *Stafford*, in the county of *Stafford*, for the purpose of being sold again by him the said Plaintiff as ready-made shoes, in a way of trade which he the said Plaintiff then and there carried on within the said borough and soke of *Doncaster*, as a seller of ready-made shoes, and that the said twelve pair of shoes, at the said time when, *&c.* were shewed forth and exposed to sale as and for ready-made shoes in the way of trade of him the said Plaintiff as a seller of ready made-shoes, at the said place, within, *&c.* at, *&c.* in the county aforesaid; and this, *&c.*; wherefore, *&c.* He also replied in a similar way to the 3d plea.

The Defendants, in their rejoinder, protesting that the said plea of the said Plaintiff above in reply pleaded was not sufficient in law for the said Plaintiff to have or maintain his aforesaid action thereof against them; for rejoinder, nevertheless, in this behalf, as before, said that the said Plaintiff, at the time when *&c.* in this declaration mentioned, at, *&c.* and within, *&c.* he the said Plaintiff then and there using and occupying the mystery or occupation of an artificer using, cutting, and working of leather, did shew forth and expose to sale, in the place there in the said 2d plea mentioned, at *Doncaster*, within the precincts of the same borough and soke and the liberties thereof, and in which the said Plaintiff did then and there use the occupation

of

of an artificer using, cutting, and working of leather as aforesaid, the said twelve pair of shoes in the said 2d plea mentioned; and because there was then and there used and put in the said twelve pair of shoes certain leather that was not sufficiently tanned and curried in the upper-leather of the said twelve pair of shoes, against the form of the statute in such case made and provided, they the said Defendants took, carried away, and seized the said twelve pair of shoes, and detained them in their custody in manner and form and for the purposes in the said 2d plea mentioned; and this, *&c.* Wherefore *&c.*

The Defendants rejoined in a similar manner to the replication to the 3d plea.

To this rejoinder the Plaintiff demurred, and assigned for causes, That the Defendants ought, in and by their said rejoinder, either to have denied the said pleas of the said Plaintiff by him above by way of reply pleaded to the 2d and last pleas in bar of the said Defendants, or to have confessed and avoided the same; whereas the said Defendants, in and by their said rejoinder, do neither deny nor confess and avoid the said pleas of the said Plaintiff above in reply pleaded, and for that the said plea of the said Defendants by them above pleaded by way of rejoinder to the plea of the said Plaintiff by him above in reply pleaded, to the 2d plea in bar of the said Defendants might have taken a good, sufficient, and material traverse on the allegation stated in the said last mentioned replication of the said Plaintiff, to wit, that the said shoes mentioned in that replication, at the said time when *&c.* were shewed forth and exposed to sale as and for ready-made shoes, in the way of trade of him the said Plaintiff as a seller of ready-made shoes; whereas the said Defendants have in their said rejoinder to that replication altogether passed by and omitted to take such traverse; and for that the said plea of the said Defendants by them above pleaded by way of rejoinder to the plea

1807.

HODGSON v. RICKARD and Others.

plea of the said plaintiff by him above in reply pleaded to the last plea in bar of the said Defendants might have taken a good, sufficient, and material traverse on the allegation stated in the said last mentioned replication of the said Plaintiff, to wit, that the shoes mentioned in the last mentioned replication, at the time when, &c. were in the custody and possession of him the said Plaintiff as and for ready-made shoes, and in the way of trade of the said Plaintiff as a seller of ready-made shoes; whereas the said Defendants have, in their said rejoinder to that replication, altogether passed by and omitted to take such traverse; and for that the said Defendants might have taken, in and by their said rejoinder, a good, material, and triable issue upon the facts contained in the pleas of the said Plaintiff, by him above in reply pleaded to the 2d and last pleas in bar of the said Defendants: yet the said Defendants altogether omit so to do; and for that the rejoinder of the said Defendants, if it confessed the matter alleged in the said replication, ought also to have avoided the same by some new matter introduced in the said rejoinder; whereas the said rejoinder doth confess the matters pleaded in the said replication, without avoiding the same; and for that the matter advanced in the said rejoinder of them the said Defendants is precisely and altogether the same with the matter before alleged in the 2d and last pleas in bar of them the said Defendants, whereby the said pleadings might go on without ever being brought to an end, and for that the said rejoinder of the said Defendants is in many other respects informal, uncertain, and insufficient, &c.

The Defendants joined in demurrer.

Bayley Serjt. in support of the demurrer. This question is raised in order to have the case of *Mason* v. *Middleton*, 3 *East*, 334. reconsidered. In that case the Court of King's Bench held that a person carrying on the trade of

1807.

HODGSON v. RICKARD and Others.

of a linnen-draper and haberdasher, but selling ready made-shoes in his shop, was not liable to the penalty imposed by 1 *Jac.* 1. *c.* 22. *s.* 40. on persons resisting a search by the searchers appointed under that act. The statute of 1 *Jac.* 1. is entitled an act "concerning tanners, curriers, shoemakers, and other artificers occupying the cutting of leather," and the provisions of the statute are directed to the regulation of these trades (*a*). Here the Defendants do not aver in their plea that the Plaintiff is a shoemaker. [*Chambre* J. The Plaintiff is alleged to be a person using and occupying the mystery or occupation of an artificer using, cutting, and working of leather.] As the statute extends to several species of persons falling under that general description, the Plaintiff should be alleged to belong to one of those distinct species, in order to justify the seizing of his goods. A sadler is a description of tradesman falling within the act; now suppose him to buy ready-made shoes, may the searchers search his house on that account? By section 30 of the act it is provided that each of the several trades enumerated in the act shall be subject to the search of the

(*a*) By statute 1 *Jac.* 1. *c.* 22. *s.* 29. certain officers there named shall, four times a year at least or oftener if necessary, "make true search and view of and for all shoes, *&c.* and other wares made of tanned leather in every house, *&c.* where any shoemaker, sadler, girdler, currier, or other artificer using, cutting, working, or dressing of leather, doth dwell or occupy any of the occupations of cutting, working, or dressing of leather, *&c.*; and it shall be lawful for the said (officers) to seize and carry away all such shoes, *&c.* which they shall find in their search to be insufficiently made, curried, or wrought. And by *s.* 32. all mayors and other head officers in boroughs, *&c.* shall yearly appoint two or more persons to search and view within their liberties, who shall make like search within their limits; "and if the said searchers find any leather sold or offered to be sold, or brought to be searched or sealed, which shall be tanned, wrought, converted, or used, contrary to the true intent of this statute, or any leather insufficiently curried, or any shoes, *&c.* or any other thing made of tanned or curried leather insufficiently tanned, curried, or wrought, contrary to any provision in this act, it shall be lawful to the said searchers to seize all such leather shoes, *&c.*

heads

1807.

HODGSON v. RICKARD and Others.

heads of his own company, and of his own company only; each, therefore, can only be liable to search in respect of those articles that constitute his own trade. If this be so, though either of the tradesman enumerated in the act should happen to have in his shop ready-made articles in which he does not ordinarily deal, no search ought to be made in respect of those articles, but only of the articles in which his trade consists. The object of the act is to punish a man for dealing in ill-wrought goods, who, from his peculiar knowledge of those articles, must be aware they are ill wrought.

HEATH J. In the case of *Mason* v. *Middleton*, the Defendant did not carry on any one of those trades which are put under the particular regulations of the 1 *Jac.* I. *c.* 22. and therefore he was not liable to any penalty for resisting a search which could only be justified by that act. But in the present case the Plaintiff is alleged to be a person using and occupying the mystery and occupation of an artificer using, cutting and working leather. If we were to hold that such a person might sell ready-made shoes not subject to search, we should establish an easy method of introducing articles of the worst manufacture into all the markets of the kingdom.

ROOKE J. It would be desirable to extend rather than to narrow the operation of this act. If shoes made at one place may be sold by persons of the trade without any inspection or restraint, the public are deceived.

CHAMBRE J. To justify the entry in order to search the person whose house is entered should belong to one of those trades which are put under the regulations of the act. But if a sadler's house is entered, and shoes of an improper manufacture are found there, they may be seized. A linen-draper's shop, therefore, cannot be entered

1807.

HODGSON v. RICKARD and Others.

tered under the provisions of the act; but if a person belonging to any one of the trades enumerated deal in articles not made by him, and the sale of which perhaps more properly belongs to a person in another branch of the trade, it would be monstrous so to narrow the construction of the act as to hold that such articles, if improperly manufactured, are not subject to be seized under the 1 *Jac.* 1 *c.* 22. Judgment for the Defendants.

Shepherd Serjt. was to have argued on the other side.

HAY *v.* HOWELL and Others.

Feb. 9th.

If Plaintiff give notice of trial for the Sittings in the term in which issue is joined, and do not proceed to trial accordingly, the Defendant may move for judgment as in case of a nonsuit in the succeeding term.

ISSUE having been joined in this case in *Michaelmas* term last, notice of trial was given for the last Sittings in that term; but the Plaintiff did not proceed to trial pursuant to notice.

Best Serjt. on a former day in this term having obtained a rule *Nisi* for judgment as in case of a nonsuit;

Vaughan Serjt. shewed cause, insisting that the motion was premature, and that one whole term must intervene between that in which issue is joined and that in which the motion is made, or else it must appear that issue was joined early enough in the term for the Plaintiff to have proceeded to trial; he cited *Baker* v. *Newman*, 1 *H. Bla.* 123. and *Wolfe* v. *Sholls*, 1 *H. Bla.* 282.; and the Secondaries seemed also to think that the motion was premature.

But *The Court* thought that as the Plaintiff had given notice of trial for the term in which issue was joined, the Defendant was entitled to move in the succeeding term.

Accordingly *Vaughan* gave a peremptory undertaking to try, and the rule was discharged upon those terms.

HOPE *v.* BENNET.

Feb. 11.

The Court discharged a rule for changing the venue upon an affidavit of the Plaintiff that the cause of action arose principally in *Ireland*.

ONSLOW Serjt. shewed cause against a rule which had been obtained on the usual affidavit for changing the venue from *Somersetshire* to *Middlesex*. In answer to

1807.

HOPE v. BENNET.

this he produced an affidavit stating that the cause of action arose principally for business transacted by the Plaintiff for the Defendant in *Ireland;* and that as Defendant's affidavit, therefore, which averred that the whole cause of action arose in *Middlesex* and not elsewhere was falsified, the Plaintiff was not bound to offer an undertaking to give material evidence in *Somersetshire*. He referred to *Cailland* v. *Champion*, 7 *Term Rep.* 205. and *Collins* v *Jacobs*, 3 *Bos. & Pull.* 579.

Best Serjt. insisted that the Plaintiff was bound to give an undertaking, and that it was not sufficient for him to swear that part of the cause of action arose out of *Middlesex;* and relied on *French* v. *Coppinger* 1 *H. Bla.* 216.

But *The Court* said that if the cause of action arose abroad it sufficiently falsified the Defendant's affidavit: and as it was therefore indifferent in which county the venue was laid, it should remain where it was first brought.

Rule discharged.

Feb. 12th.

If a writ be returnable in the first return of the term, and the Defendant give notice that the debt and costs will be paid before the appearance-day, and accordingly tender the debt and costs of the writ before that day, the Plaintiff is not entitled to the costs of a declaration delivered *de bene esse*.

Quære, Whether he would be entitled to such costs if no notice had been given?

PARTINGTON, one, &c. *v.* WILLIAMS.

THE only question in this case was, Whether the Plaintiff was entitled to the costs of the declaration?

The writ, which was returnable in eight days of *St. Hilary*, was served on the 13th of *January*, on which day the Defendant's attorney said that the debt and costs would be paid on *Wednesday* the 21st, and cautioned the Plaintiff against declaring: on the 19th *January* the Plaintiff's clerk called on the Defendant's attorney to say that the Plaintiff was instructing his agent to declare by that night's post; upon which the Defendant's attorney insisted that he had no right to do so, until the 23d, being the first day in full term, and that the Defendant meant to pay on the *Wednesday* following: on the 20th the debt and 2*l.* 12*s.* as the costs of the writ were tendered and refused, and on the next day the same tender was renewed.

A rule *Nisi* having been obtained why all proceedings should not be stayed on payment of the debt and costs of the writ,

Bayley

1807.

PARTINGTON v. WILLIAMS.

Bayley Serjt. shewed cause, and contended that the Plaintiff was entitled to declare *de bene esse* on the essoign day; and relied on *Fawcett* v. *Christie*, 2 *Bos. & Pul.* 516. where that point was expressly ruled, though the case of *Golding* v. *Grace*, 2 *Bl.* 749. was cited to the contrary.

But *The Court* (stopping *Vaughan* Serjt. for the Defendant) said, that the reason given in *Golding* v. *Grace* for disallowing the costs was unanswerable, namely, that it was matter of grace and favour to the Plaintiff to allow him to deliver his declaration *de bene esse* before the appearance of the Defendant, in order to expedite his cause, and that a Defendant who was disposed to put an end to the suit ought not to be made to pay for that which was for the benefit of the Plaintiff; that in the case of *Fawcett* v. *Christie* the attention of the Court was principally directed to the question, how far a summons without an order was a stay of proceedings; and that if a practice had prevailed conformable to that case, it was very mischievous, and ought to be put an end to.

Rule absolute, without Costs.

FENTON *v.* BOYLE and Others.

Feb. 12th.

The Plaintiff having brought replevin for goods levied under a warrant of distress for an assessment made by a special Sessions under the highway act, 13 *G.* 3. *c.* 78. *s.* 47. on the ground of the premises for which he was assessed, being situated without the township which was liable to repair the road; the Court refused to set aside the proceedings.

THIS was a rule to shew cause why proceedings in replevin should not be set aside.

The surveyors of the highways in the township of *Carleton* in *Yorkshire*, having been indicted for a road in that township being out of repair, and a fine having been laid upon them, an order was made at a special Sessions for an assessment of 5*s.* 8*d.* in the pound upon the occupiers of lands in the township, pursuant to the 13 *G.* 3. *c.* 78. *s.* 47., and a demand made upon the Plaintiff for 69*l.* 5*s.* 6*d.* as his share, which he refused to pay: whereupon a warrant of distress was granted, under which the Defendant *Boyle*, who was a constable, levied the goods of the Plaintiff; but before the expiration of the four days mentioned in the warrant for the time of sale, *Boyle* was served with a replevin. The Plaintiff in his affidavit stated

1807.

FENTON v. BOYLE and Others

stated that he had been advised and believed that the property for which he was assessed was situated in the township of *Rothwell Haigh*, and not of *Carleton*, and that from time immemorial *Rothwell Haigh* had been subject to the repair of roads within that district exclusively; and had never been rated to the repairs of the roads in the township of *Carleton*.

Williams Serjt. shewed cause, and contended that the writ of replevin was not taken away by *s.* 81. of the highway act (13 *G.* 3. *c.* 78.), which gives an appeal to the Quarter Sessions to the person aggrieved by any thing done in pursuance of the act, where no particular mode of relief was pointed out; for that if the lands of the Plaintiff were not situated in the township of *Carleton*, the acts complained of were not done in pursuance of the act, but were an excess of jurisdiction; for which an action of trespass might be maintained; and if trespass, why not replevin? and that in *The King* v. *The Justices of Yorkshire*, 5 *Term Rep.* 629. where the Quarter Sessions had exceeded their jurisdiction in receiving an appeal, the Court of King's Bench held that the writ of *certiorari* was not taken away.

Cockell Serjt. *contrà*, urged that where an act of parliament had given a remedy by distress and sale of goods, it was not competent to the person levied on to sue out a replevin. He referred to the cases cited in the note to *Pearson* v. *Roberts*, *Willes*, 672.

The Court refused to interfere.

And the Rule was disharged with Costs.

Sir *James Mansfield* Ch. J. was absent during the whole of this term from indisposition.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Easter Term,

In the forty-seventh Year of the Reign of GEORGE III.

1807.

DOE ex dem. DILNOT and Others *v.* DILNOT.

April 18.

If a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is revoked thereby.

EJECTMENT.

At the trial of this cause before *Macdonald*, Ch. B. at the last Spring assizes for *Kent*, the lessors of the Plaintiff, who claimed as heirs at law of one *John Dilnot*, deceased, having made out their pedigree, the Defendant gave in evidence a will of the said *John Dilnot*, dated the 19th of *March* 1791, under which he claimed. Upon this the lessors of the Plaintiff proved the levying of a fine by the said *John Dilnot* subsequent to the date of the will, *Mich.* Term, 37 *Geo.* 3., and a deed to lead the uses of the fine, dated the 1st *November* 1796, and insisted that the fine operated as a revocation of the will. The material clause in the deed to lead the uses was as follows: "To the use and behoof of such person and persons, and for such estate and estates, use and uses, intents and purposes, and subject and liable to such powers, provisions, conditions, limitations, and charges,

1807.

DOE v. DILNOT.

with or without power of revocation, and in such parts, shares, and proportions, manner, and form, as he *John Dilnot* shall, at any time or times during his natural life, by any deed or deeds, writing or writings, to be by him subscribed, sealed, and duly executed in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or by any writing purporting to be his last will and testament to be by him signed, sealed, and duly executed in the presence of and attested by three or more credible witnesses, convey and assure, direct, limit, and appoint, or give and devise the same, or any part thereof, and for and in default of such conveyance and assurance, direction, limitation, or appointment, gift or devise, and in the mean time and until such conveyance, *&c.* gift or devise, *&c.* shall be made, or as to such part or parts of the said premises, whereof no such conveyance, *&c.* gift or devise, *&c.* shall be made, or if any such shall be made, then and in such case, when, and as the several estates thereby limited shall cease or determine, to the only proper use and behoof of the said *John Dilnot*, his heirs and assigns, for ever, and to and for no other use, intent, or purpose whatever." On the part of the defendant it was contended, that although a fine levied subsequent to a will must generally be considered as an implied revocation; yet that the implication was capable of being rebutted; and that in the present case, where it appeared from the deed to lead the uses that the fine was intended to operate according to the will of the conusor, it could not be presumed that he meant to revoke his will by that fine. His Lordship, however, was of opinion that the fine operated as a revocation, and a verdict was found for the lessor of the Plaintiff.

Best,

1807.

DOE v. DILNOT.

Best, Serjt. for the defendant, now moved for a new trial, and repeated the observation made at the trial. He insisted that though the clause in the deed to lead the uses literally referred to a will to be made *in futuro*, yet that it must be considered in substance as equally applicable to a will already in existence, and that consequently the uses of the fine would enure according to the purposes expressed in the will. He cited *Spring d. Titcher* v. *Biles*, 1 *Term Rep.* 435. *in notis*, where a copyholder having made his will, surrendered his copyholds to such uses as he *should* direct or appoint, and Lord *Mansfield* said, "The testator had then a will whereby he had clearly declared that his copyholds should pass. And it would be strange to say that the surrender destroyed his intention. A will speaks at different times for different purposes; to many purposes from the date; to other purposes from the testator's death. It amounts in some degree to a republication; and I am clear that the surrender referred to that will which should be in existence at the time of his death."

The Court (*absente* Sir *James Mansfield* Ch. J.) said that freehold and copyhold estates stood upon very different footings in this respect. That in the case of freeholds the testator must be seised of the same estate which he devises at the time that he makes his will; that the statute of wills (*a*) only empowers a man to devise lands of which he is seised; and therefore although he may plainly declare an intention to pass lands of which he is not seised, they will not pass. They referred to Lord *Lincoln*'s case (*b*),

(*a*) 32 *H.* 8. *c.* 1. *Parl. Cas.* 154. 2 *Freem.* 202.
(*b*) 1 *Eq. Cas. Abr.* 411. *Show.*

1807.

DOE
v.
DILNOT.

and *Goodtitle d. Holford* v. *Otway* (*a*), as having settled the point.

Best took nothing by his motion.

(*a*) 1 *Bos. & Pull.* 576.

April 22

SYKES *v.* JOHN BAUWENS, sued with LEWIS BAUWENS.

One of two Defendants having been holden to bail in *Trinity* term, the Plaintiff proceeded to outlawry against the other, and delivered a declaration against the former on the first day of *Easter* term, not having obtained a rule for time to declare; held that the cause was out of court, and the bail entitled to an *exoneretur*.

IN this case the writ upon which the Defendant *John Bauwens*, was holden to bail, was returnable on the morrow of the *Holy Trinity* 1806, and special bail was put in and perfected in that term; no rule for time to declare was obtained by the Plaintiff; *Lewis Bauwens*, the other Defendant, not being in this country, was outlawed; on the first day of this term the declaration in the cause was delivered to the Defendant's attorney and returned by him, and notice given that the Court would be moved for an *exoneretur* on the bail-piece, the cause being out of court. Accordingly a rule *nisi* for that purpose having been obtained,

Shepherd Serjt. shewed cause, and urged that though the practice in this court might be that a Plaintiff who is in a situation to be able to declare, and does not declare before the end of the second term, is out of court; yet in this case the rule would not apply, because the Plaintiff could not declare till he had outlawed the joint Defendant; he also insisted that the practice of declaring within two terms applied only to the case of a Defendant who was a prisoner: and observed, that in the King's Bench the case was not out of court till the end of the fourth term.

But

1807.

SYKES v. BAUWENS.

But *The Court*, upon reference to the officers, finding that by the practice of this Court in all cases where a Plaintiff does not declare before the end of the second term, or obtain a rule for time to declare, his cause is out of court, made the

Rule absolute.

Bayley, Serjt. in support of the motion.

JOHN THOMAS SERRES and OLIVE his Wife, *v.* DODD.

April 27th.

REPLEVIN.

A declaration in replevin by *J. S.* and his wife, without shewing any cause for joining the wife, is bad on demurrer. And if Defendant demur without adding an avowry and prayer of return, it is no discontinuance.

The declaration stated that *John Thomas Serres* and *Olive* his wife complained against *James Dodd* for taking and detaining the goods and chattels of the said *John Thomas* and *Olive*, whereby the said *J. T.* and *O.* said they were injured, and had sustained damage to the value of 200*l.*, and therefore they brought their suit.

The Defendant demurred, and assigned for causes, that "the said *J. T.* and *O.* had by their declaration alleged the said *Olive* to be covert of and the wife of the said *John Thomas*, and that the Defendant took the goods and chattels of *J. T.* and *O.* and detained them; whereas by the laws of this realm no feme covert can acquire any right of property whatever in any goods or chattels otherwise than in some representative character of executrix or administratrix to some deceased person, and also for that the goods and chattels in the declaration mentioned are not alleged or shewn to be the property of or to belong to the said *J. T.* and *O.* in right of the said *O.*; whereas by the law of the land she the said *O.* being a married woman could not have any general or distinct right of property therein either jointly or otherwise with

her

1807.

SERRES v. DODD.

her husband the said *J. T.* or any other person whatever; and also for that by the laws of this realm no married woman can support any action, either jointly or alone, against any person or persons whatever for taking or detaining any goods or chattels without shewing or setting forth a right or title thereto, as personal representative of some deceased person, and also that the said *J. T.* and *O.* his wife have, in and by their said declaration, alleged that they the said *J. T.* and *O.*, by reason of taking and detaining of the said goods and chattels in the said declaration mentioned, are injured and have sustained damage to the value of 200*l.*, but have nevertheless not shewn that she the said *O.* had any interest or right of property whatever in the said goods and chattels in the said declaration mentioned. And also for that the said *J. T.* and *O.* his wife have not set forth or alleged any right or cause of action whatever in her the said *O.* against the Defendant; and also for that the said *O.* is not entitled by the law of this land to maintain any action whatever for or in respect of the said supposed charge in the said declaration mentioned against him the said Defendant; and also for that the said declaration is in various other respects insufficient and informal."

After this demurrer had been put in the Plaintiffs signed judgment for want of an avowry.

To set aside this judgment a rule nisi was obtained in *Hilary* Term last.

Marshall Serjt. shewed cause, and contended that the demurrer not being accompanied with an avowry and prayer of a return, was a discontinuance; that when the Defendant pleads any plea which takes away the Plaintiff's right to the goods he need not avow (*a*), but that in other cases he must; otherwise it is a discontinuance;

(*a*) Vide 39 *H.* 6. 35. *Wildman* v. *North*, 2 *Lev.* 92.

for

for such plea does not lead to a termination of the suit.

But *The Court* said, that the only question was, Whether they could consider the demurrer as frivolous? and not thinking that it was so, they would not hold it to be a discontinuance.

Accordingly the rule was made absolute.

The Plaintiff having joined in demurrer, the case now came on to be argued.

Marshall Serjt. was called upon to support the declaration. He contended that there were cases in which a wife may sue jointly with her husband without being executrix or administratrix, and that if there were any such case, it could not be necessary to aver the representative character of the wife; thus supposing the goods in question to have been the property of the wife before her marriage, and to have been seized before the marriage, and the replevin brought afterwards, it would be necessary to join the wife as a Plaintiff in the suit, although she had no representative character.

The Court said, there might be cases where the wife ought to join, though neither executrix or administratrix; but then something ought to be stated on the record by which her title might appear: and that in the present case nothing appeared upon the face of the record from whence the Court could infer that the wife had any interest in the goods taken, and it was not sufficient for the Plaintiffs to put imaginary cases of interest, but the title ought to be averred.

Onslow Serjt. for the Defendant.

Judgment for the Defendant (*a*).

(*a*) See *Abbot and Alice his Wife* v. *Blofield*, *Cro. Jac.* 644. where in *assumpsit* by baron and feme for money received from the hands of the wife,

1807.

SERRES v. DODD.

wife, the Court held that though they might join for money due to the *feme dum sola*, or for rent during the coverture, this ought to be shewn, and could not be intended even after verdict, and they arrested the judgment. However, in *Bourn and Wife* v. *Mattaire, Selwyn's Nisi Prius*, 250. which was replevin by husband and wife, Lord *Hardwicke* said that after verdict it might be presumed that the husband and wife had a joint property before marriage, and that the goods were taken at that time: and the Court refused to arrest the judgment. But they do not deny that the declaration would have been bad upon demurrer.

April 28th.

NEAVE *v.* PRATT.

If there be a clause in ships' articles that the seaman may leave at the end of three months if the ship is in port or in perfect safety, of which the captain is to be the sole judge, and the ship be in port in safety after three months, the seamen may leave the ship, without the permission of the captain.

THIS was an action by the Plaintiff for wages earned by him as captain's cook on board a privateer during a cruize, the Defendant being captain of the privateer. The only objection to the Plaintiff's recovery arose under that clause in the articles (signed by the Plaintiff) which imposes the penalty of a forfeiture of the wages for "twenty-four hours' absence without leave." Upon this point the evidence was that in addition to the usual clauses in the articles there was the following marginal memorandum, "to leave at the end of three months if the ship is in port or in perfect safety, of which the captain is to be the sole judge;" that the Plaintiff had served 10 months, and on his return from a cruise, while the privateer was in *Yarmouth Roads*, and the captain on shore, he asked leave of the mate to go on shore to see his wife, but was told by the mate that he could not say whether he might have leave or not; that the Plaintiff nevertheless went on shore, and never afterwards joined the ship; that the crew consisted of 20 mariners, and that 12 were enough to navigate the ship to *London*, which was her port; that *Yarmouth* is rather a dangerous place; and that the captain had previously to the Plaintiff's leaving the ship discharged the boats-

boatswain, quarter-master, and two lieutenants. The cause was tried before Mr. Justice *Chambre*, who directed the attention of the jury to the clause which left it to the captain to exercise his judgment as to the propriety of permitting any of the crew to leave the ship at the end of their time, telling them that under such a clause he did not think the captain at liberty to refuse leave without sufficient reason. The jury found a verdict for the Plaintiff for 4*l.*

Shepherd Serjt. having on a former day obtained a rule nisi for setting aside this verdict, and having a new trial granted,

Cockell and *Bayley* Serjts. now shewed cause, and relying on the directions of the learned Judge to the jury, observed that the real question seemed to be, Whether in the situation in which the ship was, it could be deemed a desertion of the Plaintiff's to have quitted her without leave, considering that his time was expired? They contended that as there could be no such thing as absolute safety, the main point for the jury to consider was, Whether the ship was according to all reasonable appearances in a state of safety when he quitted? and that the Defendant had manifested his opinion upon the subject by discharging so many officers previous to the time at which the Plaintiff went on shore.

Shepherd Serjt. *contrà*, insisted, that though the Plaintiff's time had expired, still he could not quit the ship without leave of the captain; and that a different construction of the articles would lead to the conclusion that the sailors might leave the ship in a gale of wind, or at any other moment when their service was most wanted. He observed, that if a man contract to build a house according to the judgment of any particular surveyor,

1807.

NEAVE v. PRATT.

the question upon such a contract is no longer whether the house be well built, but whether it be built to the satisfaction of that surveyor; that the present Plaintiff having quitted during the absence of the captain from the ship, had deprived him of all opportunity of exercising his judgment as to the fitness of the time he had chosen, and consequently no question could arise as to the propriety or impropriety of the mode in which he had exercised that judgment. He cited *Wood* v. *Worsley*, 2 *H. Bl.* 574. and the same case in error, 6 *Term Rep.* 710.

HEATH J. I doubt whether the proviso upon which this question has arisen be not void, *viz.* that the captain is to be the sole judge whether the Plaintiff should leave at the end of his three months or not, for it is wholly repugnant to the preceding part of the clause enabling him to quit at the end of three months. Suppose a man to covenant to pay rent, provided that he shall pay nothing unless he likes it; the covenant to pay would be good and the proviso void. So in this case, the liberty to quit the ship at the end of three months, provided the captain pleases, is no liberty at all. I think, therefore, these articles ought to receive a reasonable construction, and that we ought not by our interpretation of them to enable the captain to keep his crew until the end of the war. Such an interpretation would be subversive of the liberties of these sailors. Whether the ship was or was not in a state of safety when the Plaintiff quitted her, was a question for the jury, and they have decided it. The case of *Wood* v. *Worsley* does not apply to this case, because there the Plaintiffs had undertaken for the act of another person at all events.

ROOKE J. I think the construction put upon these articles a very reasonable one, and that we ought not to disturb what has been done by the jury.

CHAMBRE

1807.

NEAVE v. PRATT.

CHAMBRE J. Under these articles I think it quite clear that the captain could not have taken his crew to the *East Indies*. Had the verdict been the other way there would have been no objection to it, but I think there is no reason to interfere with what the jury have done.

Rule discharged (*a*).

(*a*) Vide *Eagleton* v. *East India Co.* 3 *Bos.* & *Pull.* 55.

MOORES *v.* HOPPER.

April 29th.

A., as captain, by charter-party between himself and *B.*, agreed to receive a cargo of the agents and assigns of *B.*, and *B.* agreed to procure the same; *A.* having received a cargo aboard signed a bill of lading, stating the goods to have been shipped by order of *C.* and to be delivered to his order, and freight to be paid according to the charter-party: In an action for negligence in stowing the goods, brought by *C.* against *A.*, held that *C.* was only an agent, and that the action should have been brought in the name of *B.*

THIS was an action brought against the Defendant as captain of the ship *Blaydes*, for negligence in stowing a cargo of currants which he had taken on board at *Zante* to be delivered in *England*.

At the trial before *Heath* J. at the *Guildhall* Sittings after last term, it appeared that a charter-party had been entered into between the Defendant as captain and one *Partridge*, by which the Defendant agreed to receive a full cargo of currants of the agents or assigns of *Partridge*, and deliver the same to *Partridge*, his executors, administrators or assigns; and *Partridge* agreed to procure a cargo of fruit, and pay freight; that when the cargo was taken on board at *Zante*, the Defendant signed a bill of lading, which stated that the goods were shipped by *Samuel Strange*, by order of *Rovedino* of *Venice*, and *Moores* of *Leghorn*, to be delivered to the order of *Wm. Moores*; and freight to be paid *à tenor del contratto del noleggio*. On the part of the Defendant it was objected that the action should have been brought in the name of *Partridge*, with whom the charter-party was made, it being evident that *Moores* was merely his agent. The jury said they had no doubt that *Moores* was merely an agent; whereupon the Plaintiff was nonsuited.

A rule

1807.

MOORES v. HOPPER.

A rule *nisi* for setting aside this nonsuit having been obtained,

Best and *Bayley* Serjts. shewed cause, and insisted that as the whole ship had been chartered by *Partridge*, the freighter was the only person entitled to bring the action, though in the case of a general ship the captain would be liable to the person mentioned in the bill of lading; that the bill of lading in this case was entered into with reference to the charter-party, by which it was there stated that the freight was to be regulated; and that it was of importance that the action should be brought in the name of the real party, who lived in this country within the jurisdiction of the Court, rather than of the agent, who lived abroad.

Shepherd Serjt. in support of the rule, contended that the captain was bound by the bill of lading which he had signed; that he undertook by the charter-party to receive a cargo from such persons as the freighter should direct; and it did not follow that the person to whom he was directed was the agent of the freighter; that having agreed by the bill of lading to deliver to the order of *Moores* he was bound to do so, and if *Moores* had indorsed the bill of lading to any other person than *Partridge* the captain must have complied with that indorsement; that the reference to the charter-party in the bill of lading only respected the rate of freight, and that if any particular mode of stowage had been agreed upon the conclusion of the bill of lading would have been the same as in this case; and that the charter-party with *Partridge*, therefore, would not preclude the right of action which accrued in consequence of the negligence in delivering to the order of *Moores* as expressed in the bill of lading.

The

1807.

MOORES v. HOPPER.

The Court (*absente* Sir JAMES MANSFIELD Ch. J.) thought that the action ought to have been brought in the name of *Partridge*; that the captain, by the charter-party, was bound to receive his cargo from the agents or assigns of *Partridge*, and from no one else; and it did not appear that an assignment had been made to *Moores* so as to constitute him an assignee; that the bill of lading was therefore perfectly consistent with the charter-party to which it referred; and they observed that it was easy to understand why the action was brought in the name of a person living at *Leghorn*; and therefore they thought the nonsuit right.

Rule discharged.

VAUGHAN *v.* WHITCOMB. *April* 29th.

TROVER for a mare.

At the trial of this cause before *Thompson* Baron, at the last *Gloucester* assizes, it appeared that the Plaintiff having ridden to the house of the Defendant on his own mare, proposed to the Defendant to toss up for her against two horses of the Defendant; that the Plaintiff and Defendant accordingly tossed up, the mare being then in the Defendant's stable, and the Defendant won; that the Plaintiff said the mare was fairly won, and came away, leaving the mare in the Defendant's possession, where she had remained ever since; that the value of the mare was 25*l.*, and that the action was not brought till more than three months after the tossing up. A verdict was found for the Plaintiff, with liberty for the Defendant to move that a nonsuit might be entered.

Accordingly *Williams* Serjt. having obtained a rule *nisi* for that purpose,

Shepherd

The 9 *Ann. c.* 14. which avoids all securities for goods or money lost at unlawful games, and gives the loser a power to recover back the same within three months, does not make the contract void; but voidable only; and therefore the loser cannot recover them after three months, though the winner can shew no title to them except what arises from having won them at play.

1807.

VAUGHAN v. WHITCOMB.

Shepherd and *Clayton* Serjts. now shewed cause. The tossing up by which the Plaintiff's mare was won, is an illegal game within the meaning of the 9 *Ann. c.* 14. Tossing up was clearly so considered in *Barjeau* v. *Walmsley*, (*a*) 2 *Str.* 1249.; and many other games, not named in the statute, have been holden to be within the words "other game whatsoever." There was no other delivery of the mare by the Plaintiff to the Defendant, but putting her in his stable; where she remained at the time of the tossing up. The Defendant, therefore, in order to make out his own title, is obliged to resort to the illegal means by which the property was transferred; and although the period is elapsed within which the Plaintiff would be entitled to recover the money or goods lost under *s.* 2. of the act, yet he may still maintain this action, since the Defendant cannot prove any transfer of the property to him but by an act which amounts to a breach of an act of parliament (*b*).

HEATH J. There is no substantive clause in the act of parliament which avoids the contract (*c*). It is only

(*a*) Horse racing. *Goodburn* v. *Marley*, 2 *Str.* 1159 *Blaxton* v. *Pye*, 2 *Wils.* 309. *Clayton* v. *Jennings*, 2 *Bl.* 706 —A foot race. *Lynall* v. *Longbottom*, 2 *Wils.* 36.—Cricket. *Jefferys* v. *Walter*, 1 *Wils.* 220.

(*b*) The 1st section enacts, That all notes, &c. and other securities for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on such as do game, or for repayment of money knowingly lent for such gaming or betting, or at the time and place of play, &c. shall be void; and when such securities shall incumber lands, &c. they shall devolve to such person as would be entitled if the grantor were dead.

The 2d section enacts, That any person who shall at any time or sitting, by playing at cards, &c. or other game whatsoever, or by betting, &c. lose to any one person in the whole the sum or value of 10*l.* and shall pay or deliver the same, shall be at liberty, within three months, to sue for and recover the money so lost; and if the loser shall not sue within the time aforesaid, it shall be lawful for any person to sue for and recover the same, and treble the value thereof, one moiety to go to the Plaintiff, and the other to the poor of the parish.

(*c*) *Akinbrook* v. *Hall*, 2 *Wils.* 309.

rendered

1807.

VAUGHAN v. WHITCOMB.

rendered liable to be defeated *sub modo;* for which purpose the Plaintiff must bring his action within a limited time: and there is no doubt, on the act of parliament, that the Plaintiff is now too late.

ROOKE and CHAMBRE Js. concurred.

Rule absolute.

LONGCHAMP on the Demise of ANN GOODFELLOW *v.* SAMUEL FISH.

April 30th.

It is not necessary to the validity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses.

THIS ejectment was tried before *Macdonald*, Chief Baron, at the Lent assizes for the county of *Kent* in this year, and a verdict was found for the lessor of the Plaintiff.

On a former day, in this term, a rule *nisi* for setting aside the verdict and having a new trial was obtained by *Shepherd* Serjt., on an objection, suggested at the trial and now renewed, to the due execution of a will under which the lessor of the Plaintiff claimed. The objection was, that the testator being blind, the will should have been read over to him in the presence of the attesting witnesses before he executed it. The facts of the case with respect to this objection appeared from the report to be as follow: The testator being 80 years old, and blind, in *July* 1801 applied to a friend of the name of *Davis* to make his will, and dictated every word himself, making a devise in favour of the lessor of the Plaintiff, who was his step-daughter, and lived with him, to the disadvantage of the Defendant, his son. After the will was written by *Davis*, the testator went into the room where the lessor of the Plaintiff, with other persons, was, and desired *Davis* to read it over, and then said, "Now *Nancy* are you satisfied?" *Davis* then took the paper

1807.

LONGCHAMP v. FISH.

paper away with him, to get it copied, and when he brought it back fairly copied, two months afterwards, the testator made an alteration in it, and perfectly understood what he was doing. After the alteration made in the will, it was executed by the testator in the presence of *Davis* and the three attesting witnesses named by the testator. The will was not read over in the presence of the three attesting witnesses before it was signed by the testator, but was merely placed before him in their presence and executed. The Lord Chief Baron at the trial expressed a clear opinion in favour of the lessor of the Plaintiff.

Best Serjt. now shewed cause. There is no rule of law, requiring a will to be read over to a blind man in the presence of the attesting witnesses; and indeed in most cases those who are able to read their own wills do not do it, but trust to the attorney by whom it is prepared. The case of an illiterate testator is as strong as this, and yet it never was held in *Westminster Hall* that the will of such a man, if not read over to him before the attesting witnesses, was therefore bad. Suppose this to have been a will of personalty merely, and not of lands, can any man doubt that it would have been deemed to have been duly executed? Then let us see what alterations in the execution of a will of lands the 29 *Car.* 2. *c.* 3. has introduced, observing, however, that no regulation with respect to the reading the will over in the presence of the witnesses is introduced by that statute. The statute requires that wills of lands "shall be in writing, and signed by the party devising the same," all which was complied with in this case; it also requires that they "shall be attested and subscribed in the presence of the devisor by three or four credible witnesses," which was also complied with. Neither the terms nor the spirit of that statute require that the will should be read over in the

1807.

LONGCHAMP v. FISH.

the presence of these witnesses. The only question for the jury in the case of a blind man, as in every other case, is, Whether they are satisfied that the instrument is really and *bonâ fide* his instrument. In *Swinburn*'s Treatise, vol. 1. p. 166. (*a*) of the last edition, the following passage occurs, which was cited when this rule was moved for and relied on; "he that is blind may make a nuncupative testament by declaring his will before a sufficient number of witnesses; and he may make his testament in writing, provided the same be read before witnesses, and in their presence acknowledged by the testator for his last will. But if a writing were delivered to the testator, and he not hearing the same read, acknowledged the same for his will, this would not be sufficient, for it may be that if he should hear the same read he would not acknowledge the same for his will." In this passage the author is evidently speaking of a blind man's will prepared and written by some other person, and pointing out the way in which such an instrument should be acknowledged by the testator. In this case the testator evidently knew the contents of this will having dictated the whole of it himself, and having heard it read over by *Davis* in his presence. Dr. *Burn*, *Eccles. Law*, tit. *Wills*, 1. *s.* 11. when commenting on the passage cited from *Swinburn*, observes, "and it seemeth best that it be read over to the testator and approved by him in the presence of all the subscribing witnesses. And this the civil law did expressly require in the case of a blind man's will; but in *England* this strictness seems not to be precisely requisite, if there shall otherwise be satisfactory proof before the Court that the identical will was read over to him, although it was not in their presence; and sometimes the single oath of the writer hath been allowed sufficient by the Court of Delegates to prove the identity of the will." The learned writer

(*a*) Ed. 1677. p. 64. Part. 2. c. 11.

1807.

LONGCHAMP v. FISH.

therefore admits that the objection made in this case would have had no effect here at common law, though it might avail in the civil law; and as no authority can be cited for any such rule at common law, the lessor of the Plaintiff is entitled to recover.

Shepherd and *Bayley* Serjts. in support of the rule. It seems to be admitted that a blind man's will must be read or communicated to him at some time before he executes; and indeed if it were not he would execute in a very extraordinary way. With respect to wills of personalty, where no attesting witnesses are required, the mere fact of the testator's signature raises the inference that he knows the contents of the will. But in these cases in which the statute requires attesting witnesses the necessary inference from their attestations ought to be that they were sure that the testator knew what he was executing. Now this inference cannot be fairly drawn in the case of a blind man, unless some one at least of the attesting witnesses has heard the will correctly read to the testator. In this case it is necessary to resort to a fourth witness, in order to raise the inference of the testator's knowledge. If a testator be illiterate, an attesting witness can hardly be said to have satisfied his duty if he has not looked over the will and seen that it is correctly read to the testator; for if a will be read over in the hearing only of the witness, and he does not peruse it, he can have no knowledge whether it be read correctly or not. And this precaution is the more necessary, because, after the death of the witnesses, the law presumes that every thing was rightly done. It is impossible to contend that the mere signature of the testator, if he be blind, together with the mere attestation of witnesses, who knew not the contents of the paper the execution of which they attested, will raise any presumption that the testator has executed a will of the provisions

provisions of which he was fully aware. Beyond the evidence of the attesting witnesses, there must, in such a case, be some additional evidence to establish the presumption of knowledge. Now the object of the statute was that there should be three witnesses, who should attest, not only the hand-writing of the testator, but also that his mind accompanied the act of signature. In *Godolphin's Orphan's Leg.* part 1. c. 11. p. 34. the passage cited from *Swinburn* is to be found. The heir at law should be enabled to learn from the witnesses whose names appear to the will whether the testator's mind accompanied the signature, and he ought not to be obliged to resort to witnesses who do not appear upon the face of the will in order to ascertain that fact. And indeed unless the will be read over by the attesting witnesses, there can be no certain guard against the substitution of some fabricated will in the case of a blind man.

HEATH J. The statute of frauds only requires that the testator shall execute the will in the presence of the attesting witnesses; and, in ordinary cases, when that is done all is done that is necessary to be done. It is true that frauds are sometimes practised, and it was with a view of preventing these frauds that the statute directed the will to be signed in the presence of the attesting witnesses. In the case of a blind man stronger evidence would be required than the mere attestation of signature, but in this case there was that stronger evidence which the peculiarity of the case seems to call for. In the course of the argument sufficient attention has not been paid to the distinction between what shall be deemed a literal compliance with the provisions of the statute and what sufficient proof to rebut any imputation of fraud. The question of fraud is for the jury entirely, and here they found the will to be a valid will. The Lord Chief Baron was of that opinion at the trial, and I agree

1807.

LONGCHAMP v. FISH.

with him. Great inconvenience would arise from any rule requiring the wills of blind men to be read over in the presence of the attesting witnesses, nor would the mere reading it aloud to them be a certain guard against fraud, since it might be read falsely. No authorities from the civil law have any force or application in this case.

ROOKE J. There is not the least imputation of fraud in this case: but the application made to us to set aside the will is founded on mere technical reasoning. Now, unless compelled so to do by the provisions of the statute, I never would set aside a will upon mere technical reasoning. The statute only requires that the witnesses shall attest their having seen the testator sign the will, and that the witnesses in this case do attest. If a fair ground for presuming fraud were laid by the evidence, the circumstance of the testator being blind would most materially strengthen that presumption.

CHAMBRE J. This question must be decided by the provisions of the statute of frauds. Now it does not appear that the Legislature, when they passed that statute, had in their contemplation executions of wills by blind men. Testators are generally very averse to have their intended dispositions of property made known in their families before their deaths; and blind men, who stand so much in need of attention from their relatives, would probably be peculiarly averse to it. The remainder of their lives might, in consequence of such disclosures, be rendered completely uncomfortable. At all events, they might produce great discord in families. There cannot be a doubt that if this were an instrument by deed or any other written engagement that the mere signature of the party, though blind, would be deemed a sufficient execution; and the only thing to be proved would be, that the

the blind man was not imposed upon. In this case that fact is completely established by an unimpeached witness, who took instructions from the mouth of the blind man himself, and wrote them down.

Rule discharged.

SPARKES *v.* O'KELLY.

May 4th.

The condition of a bond, after reciting the grant of an annuity by the Prince of *Wales* to *S. C.* an assignment of the same to the obligee, with assent of the Prince, and an agreement that the obligor should give his bond as an additional security, was declared to be that if the Prince or his treasurer, or any person for him, should pay the annuity quarterly to the obligee, the bond should be void. Held that upon failure of payment the obligee was entitled to sue the obligor without having first presented a particular of his demand to the Prince's treasurer pursuant to 55 G. 3. c. 125. s. 7.

SCIRE facias on a bond in the penal sum of 1260*l.* with a condition reciting, that by indenture bearing even date with the said bond or obligation, made or expressed to be made between *Samuel Chiffney*, of *Newmarket* in the county of *Cambridge*, of the one part, and the abovementioned Plaintiff of the other part, reciting a grant of an annuity by his Royal Highness *George* Prince of *Wales* to the said *Samuel Chiffney* of 210*l.* during the life of his said Royal Highness, payable by the treasurer of his privy purse on the four quarterly days therein and hereinafter mentioned; and also reciting that the said *Chiffney* had agreed with the said Plaintiff for the absolute assignment to him of the said annuity for the sum of 1260*l.*; it was witnessed that in consideration of the sum of 1260*l.* paid by the Plaintiff to the said *Samuel Chiffney* in manner therein particularly mentioned, he the said *Samuel Chiffney* did, with the privity, consent, and approbation of his said Royal Highness, testified as therein mentioned, grant, bargain, sell, transfer, and set over unto the Plaintiff, his executors, administrators, and assigns, the said annuity of 210*l.* payable to the said *Samuel Chiffney*, his executors, administrators and assigns, for and during the life of his said Royal Highness, and all sum and sums of money due thereon from the 5th day of *October* then last; and that at

1807.

SPARKES v. O'KELLY.

at the time of the said contract it was agreed that the Defendant, as a further additional security for the payment of the said annuity, assigned by the said deed of even date with the said obligation, should enter into the said bond conditioned for the payment of the said annuity as thereinafter mentioned; and it was declared that the condition of the said writing obligatory was such, *that if his said Royal Highness* George *Prince of* Wales, *or the treasurer of his privy purse for the time being, or any other person for his said Royal Highness, or the said Defendant, his heirs, executors, or administrators,* did and should well and truly pay or cause to be paid unto the Plaintiff, his executors, administrators, and assigns, for and during the natural life of his said Royal Highness, an annuity or clear yearly sum of 210*l.* of lawful money of *Great Britain*, free and clear of and from all rates, taxes, charges, abatements, and deductions whatsoever, by four equal quarterly payments, at or upon the 5th day of *January*, the 5th day of *April*, the 5th day of *July*, and the 5th day of *October* in every year, the first quarterly payment thereof to be made on the 5th day of *January* next ensuing the date of the said writing obligatory, then the said bond or writing obligatory, should be void, or else should be and remain in full force and virtue. The declaration then proceeded to state that judgment was recovered upon the bond for a certain breach, and that since the recovery of the judgment there had been a suggestion of another breach by non-payment of one year's annuity, and that 210*l.*, the amount of the year's annuity, had been satisfied; and then suggested, as a further breach, "that although his said Royal Highness *George* Prince of *Wales* still is in full life, to wit, at, &c. yet neither his said Royal Highness, nor the treasurer of his privy purse for the time being, nor any other person for his said Royal Highness, nor the said Defendant, did not nor would, after the making of the said writing obligatory,

gatory, well and truly pay or cause to be paid unto the Plaintiff or his assigns the said annuity or clear yearly sum of 210*l.* free and clear of and from all rates, charges, taxes, abatements, and deductions whatsoever, by the four equal quarterly payments in the said condition mentioned, or otherwise howsoever; but on the contrary thereof, after the making of the said writing obligatory, and after the recovery of the said judgment, and during the natural life of his said Royal Highness, to wit, on the 5th day of *October*, in the year 1806, aforesaid, at *Westminster* aforesaid, in the county aforesaid, a large sum of money, to wit, the sum of 105*l.* of, &c, for two of the said quarterly payments of the said annuity then elapsed, became and was and still is due and owing to the said Defendant, contrary to the form and effect of the said writing obligatory, and the condition thereof, to wit, at *Westminster* aforesaid, in the county aforesaid.

To this suggestion the Defendant pleaded *executionem non* as to 52*l.* 10*s.*, part of the said 105*l.* above mentioned, because the demand of the said Plaintiff against his said Royal Highness the Prince of *Wales* for the said 52*l.* 10*s.*, being the first of the said quarterly payments of the said annuity, accrued due after the 5th day of *July*, 1795, to wit, on the 5th day of *June*, 1806, to wit, at *Westminster* aforesaid, and the said Plaintiff then and there being a creditor of his said Royal Highness, and having and claiming to have the said demand in the said plea abovementioned against his said Royal Highness, did not deliver a particular in writing of the said demand above in this plea mentioned, containing the nature and amount of the said demand, and signed by him the said Plaintiff, to the treasurer or principal officer of his said Royal Highness, at any time within ten days after the expiration of the quarter of a year in which such demand accrued, according to the form of the statute in that case made

1807.

SPARKES v. O'KELLY.

made and provided (*a*); and this, &c. wherefore, &c. To the remaining *52l. 10s.* for the last quarter a similar plea was pleaded in bar.

To these pleas the Plaintiff replied respectively, that "he was not nor hath been at any time since the said quarter became due, a creditor of his said Royal Highness for the said sum of *52l.* 10*s.* or any part thereof, nor did he then have or claim to have, nor hath he at any time since had or claimed to have any debt or demand against his said Royal Highness for the said sum of *52l.* 10*s.* or any part thereof, *modo et formâ*, &c. And this, &c. wherefore, &c.

To these replications there were special demurrers, assigning causes not necessary to be noticed. The Plaintiff joined in demurrer.

Heywood Serjt. in support of the demurrer. The condition of the bond does not expressly state that the Defendant is not to pay till default made by the Prince of *Wales*, but it is the evident intent of the parties in the transaction that such only should be his liability. The assignment of the annuity was with the assent of his Royal Highness, and the condition of the bond recites that the Defendant, as a further additional security for the payment of the said annuity, entered into the said bond. Had the bond stopped there, no doubt could have been entertained that the Defendant was merely liable in default of the Prince of *Wales*; but it adds, that if his Royal Highness or his treasurer, or the Defendant, should pay, then the bond should be void. But still the Defendant was not to be called upon till those persons whose names preceded his had been called upon. The person who purchased the annuity of *Chiffney* did not like the single security of the Prince of *Wales*, and there-

(*a*) 35 *Geo.* 3. *c.* 125. *s.* 7.

fore

1807.

SPARKES v. O'KELLY.

fore the Defendant became an additional security; but as he was not paid the purchase-money, it is the manifest intention of the bond that he is not to be liable in the first instance, but only in default of the grantor of the annuity. The case of *Ingoldesby* v. *Steward*, 1 *Rol. Abr.* 409. *pl.* 2. (G), *Obligation*, is a very old and a very strong case to shew how far manifest intent operates in the construction of a bond. The words of the condition there were "the condition of this obligation is such, that if the above bounden *A. B.* do discharge the obligee of such a recognizance, &c. and whereas also the above bounden *A. B.* hath agreed to free and discharge the said obligee from two several obligations, &c. Now the condition of this obligation is such, that if the said *A. B.* do save and keep harmless the obligee of and from the said two several obligations, then this present obligation to be void:" and it appearing from the words of the condition to have been the intent of the parties that the condition should extend to the recognizance as well as the two obligations, it was held to extend to it accordingly. In this case it is only necessary to read the beginning and end of the condition together to see what was the intent of the parties. [*Chambre* J. The Defendant being a surety, may it not be considered that the act of parliament, which discharges the demand as against his Royal Highness, unless delivered in to his treasurer within a given time, is a release to the Defendant, in the same way as if the demand had been settled with the principal, and could not therefore be recovered against the surety?—*Heath* J. Sureties for infants and feme coverts upon engagements voidable have been held liable.] It was incumbent on the Plaintiff to do that which would enable him to recover the arrears of the annuity from his Royal Highness; and if by his default all remedy against his Royal Highness is gone, has he not thereby discharged the Defendant, who is only a surety? To this effect is *Bro. Abr.* tit.

1807.

SPARKES v. O'KELLY

tit. *Condition, pl.* 127. and *Dyer*, p. 30. For an annuity, whether charged upon land or not, when assigned, the assignee has the same remedies that the assignor had, and consequently the Plaintiff, not *Chiffney*, was the person who should have enforced it against the grantor. *Owen's Rep.* 3. *Baker* v. *Brook*, *Moor*, 5. and *Maund*'s case, 7 *Rep.* 28. *b.* Undoubtedly the annuity could not be paid to any person but the Plaintiff, as assignee of the original grantee, with the assent and approbation of the grantor.

Bayley Serjt. *contrà*. It has been assumed throughout the argument that the Plaintiff is the only person who could deliver in a particular of the demand, whereas the Defendant should have taken care that *Chiffney* did all those acts which would enable his assignee to recover from the grantor. A particular delivered in by him would have satisfied the act, and yet it does not follow because he delivered in the particular that he would have been entitled to payment. The original grantee, notwithstanding the assignment, is the creditor within the meaning of the act by whom the demand was to be made, for he is at law the only creditor. To the cases cited on the other side this short answer will suffice, viz. that in those cases the annuities were charged upon land, in respect of which a privity arises between the grantor and assignee, and the latter may distrain. It is quite clear that no action could be maintained by the assignee for a *chose in action*. Indeed the common forms of assignments shew that all proceedings must be in the name of the assignor; for there is always a power of attorney to use his name. The argument on the other side rests upon the assumption that the assignee ought to have made the demand, and that failing, the whole argument fails. By the condition of the bond the Defendant undertakes that if the Prince of *Wales* or his treasurer does not pay the

the annuity he will. Neither the Prince of *Wales* nor his treasurer have paid, and it is not true that they have been prevented paying by any neglect of the Plaintiff. Indeed they might have paid voluntarily without any demand or particular delivered. Before the Court can pronounce upon the equitable rights of the Plaintiff under this assignment, they must see the deed of assignment. But whatever the effect of such a deed may be in equity, still the original grantee remains the creditor of the grantor at law.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

HEATH J. The question is, Whether this be a good plea? It is contended in support of the demurrer, that the Defendant is not bound to pay according to the terms of the condition of the bond, but in default of the Prince of *Wales*. It seems to be admitted that such is not the literal construction of the condition of the bond. In truth the plain import of the condition is, that the Plaintiff shall be at liberty to sue the Defendant without having recourse to the Prince of *Wales*. But it is urged that the condition of the instrument must be qualified by the precedent recital, and by reference to the statute stated in the plea, from whence the intention of the parties ought to be collected. The recital simply states the agreement for the assignment, the consideration of it, and, what has been much relied on, the assent of the Prince of *Wales*. That assent cannot vary the construction of the condition. It was proper and decorous for the original grantee to apply for such assent; it was a prudent and indispensable precaution in the Plaintiff to require it, lest after the purchase the grant of the annuity might be impeached as having been improperly obtained. There can be no doubt but that the generality of the condition

1807.

SPARKES v. O'KELLY.

dition might be restrained by the apparent intention of the parties on the face of the instrument itself; but we are of opinion that no such intention can be collected from thence. It has been argued that this is merely an additional security, and that by reason of the Plaintiff's default in not delivering the particular, the arrearages for a quarter are lost. It is not true that they are lost; for if the Plaintiff recovers against the Defendant, the Defendant will have a right to recover against the treasurer of the Prince of *Wales*, as for so much money paid to the use of the Prince of *Wales*, as in the ordinary case when the surety pays the debt due from the principal. If the construction contended for by the counsel of the Defendant were to obtain, the Plaintiff would not have that for which he contracted, because he contracted for an annuity payable quarterly; but if he were first to prosecute his claim against the treasurer of the Prince of *Wales*, and not to prosecute it till the Prince of *Wales* was in default, he must at least wait three months. It remains to be considered whether it behoved the Plaintiff to have delivered a particular in writing of this demand to the treasurer of the Prince of *Wales*, within ten days after the expiration of the quarter of the year in which such demand accrued; and this seems to be the principal point in the cause. 1st, It may be answered, that the annuity became due on the quarter day; that the Defendant might have been sued the next day, and there could have been no default till the end of ten days. The subsequent laches of the Plaintiff, if any, could never divest a right of action which had once attached. 2dly, The argument proves too much; for if it were the duty of the Plaintiff to deliver a particular, he must have waited for three months before the Prince of *Wales* was in default, and he might sue the treasurer. If he must sue the treasurer, and if he should obtain a verdict, it only remained a charge on the fund to be paid at the

1807.

SPARKES v. O'KELLY.

good pleasure of the treasurer, after previous judgments had been satisfied; and I cannot say that the Prince of *Wales* would be in default until the whole course was run. It is impossible to read the condition of the instrument, and to put such a construction on it. If the Defendant had it in view to charge the fund in the hands of the treasurer with this debt in the first instance, and to make himself only liable in default of that fund, it was his folly not to have taken from the Plaintiff some covenant which might have produced that effect; but would the Plaintiff have submitted to those terms? It seems clearly to us that it was the intention of the Plaintiff to have it in his power to call on the Defendant in the first instance, without having recqurse to the fund of the Prince of *Wales*, and that the terms of the condition are well adapted to that purpose.

Judgment for the Plaintiff.

MAIDMENT, Demandant, *v.* JUKES and Another, Tenants.

May 4th.

The Court will not permit the Demandant in a writ of right to discontinue.

THE Demandant in this writ of right, having discovered a mistake in his count, obtained a side-bar rule to discontinue.

Cockell Serjt. on a former day obtained a rule nisi to discharge the above rule, and cited *Charlwood* v. *Morgan*, *ante*, vol. 1. p. 64.

Williams and *Best* Serjts. now shewed cause, and produced an affidavit, stating the mistake to be an omission of one step in a descent from the grandfather.

The Court said they would not assist the Demandant, and made the rule absolute with costs.

1807.

May 11th.

AYLWIN *v.* FAVINE.

Where several causes are consolidated, if a writ of error be issued in the cause tried, and execution taken out for want of bail in error being duly put in, and the writs of error be issued in the other causes and bail duly put in, execution in those causes is thereby stayed; for the consolidation rule only relates to the verdict.

THE Plaintiff in this case having brought actions against the Defendant and several other underwriters upon a policy of insurance, a consolidation rule was obtained, by which it was ordered that the several parties should be bound by the verdict to be given in a cause of *Aylwin* v. *Wylie*. That cause having been tried, and a verdict found for the Plaintiff, the Defendant brought a writ of error; but having omitted to put in bail in error within due time, the Plaintiff took out execution. The Defendant in the present action then brought a writ of error, and put in bail, notwithstanding which the Plaintiff moved for leave to sue out execution against him.

Shepherd and *Best* Serjts. contended, that as the several Defendants were bound to abide the event of *Aylwin* v. *Wylie*, and the Plaintiff in that cause was entitled to sue out execution, he was also entitled to do so in the other causes.

Sellon Serjt. *contrà*, insisted that the effect of the consolidation rule was confined to the event of the verdict; and therefore, notwithstanding the neglect of *Wylie* to put in bail in error, the Defendants in each of the other causes were entitled to stay execution by their writs of error.

Sir JAMES MANSFIELD C. J. The form of the consolidation rule decides this motion; which is, that the proceedings in the several causes shall be stayed, and

that

that the parties shall be bound by the verdict to be given in the cause of *Aylwin* v. *Wylie*, if that shall be to the satisfaction of the Judge and the Court. How then can we say that this rule deprives the Defendants in any of the actions from bringing writs of error? It is admitted that in the action tried the Defendant was entitled to bring a writ of error. Then why should the other Defendants be precluded? It is contended, however, that as the Defendant in the action tried has been prevented by a blunder from rendering his writ of error effectual, that blunder shall affect the other Defendants. But there is nothing in the rule to authorize that position. The order relates solely to the verdict.

The other Judges concurring,

Rule discharged.

CORDEN, Demandant, HALL, Tenant, and COLCLOUGH, Vouchee.

May 11th.

SHEPHERD, Serjt. moved for leave to amend a common recovery by inserting the word "tithes."

The Court amended a recovery of the 17 G. 3. by inserting the word "tithes," the deed to lead the uses having conveyed all the hereditaments late of *C. C.* deceased, who had devised all his hereditaments at *M.* to the vouchee, and it appearing to have been lately discovered that the devisor was entitled to the tithes of *M.*

The recovery was suffered in *Hilary* term 17 *Geo.* 3. and no mention of tithes was made therein, because the attorney who prepared it was not aware that the vouchee was entitled to them. It was stated, however, by affidavit, that he had lately discovered that Mr. *Colclough*, the uncle of the vouchee, was entitled to them, and that it was the intention of the vouchee that the deed to lead the uses and the recovery should comprise all the estate and interest which had passed to him by the will of his uncle who had devised to him all his lands, tenements, and hereditaments at *M.* in the parish of *Hearne* in the county

1807.

CORDEN, Demandant, &c.

county of *Derby*, in tail. The deed to lead the uses was executed on the 2d *January*, 1777, and conveyed, among other things, all the hereditaments late of *C. Colclough*, Esq. deceased, and all the hereditaments of the said *C. Colclough*, party thereto, in the county of *Derby*.

The Court gave leave to amend.

END OF EASTER TERM.

Sir JAMES MANSFIELD Ch. J. was absent during the whole of this term from indisposition.

CASES

ARGUED AND DETERMINED 1807.

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Trinity Term,

In the Forty-seventh Year of the Reign of GEORGE III.

KENMAN *v.* BEAN.

June 1st.

A declaration cannot be filed conditionally after the time for the Defendant's appearance has expired, whether the process be bailable or not bailable.

IN this case a question arose, Whether a declaration could be filed *de bene esse* after the expiration of the eight days allowed for the appearance of the Defendant?

Shepherd Serjt. contended that there was a distinction in this respect between those cases where the process was bailable and those where the process was not bailable; insisting that though in the latter the declaration could not be filed *de bene esse* after the eight days, yet that in the former it might.

Best Serjt. *contrà.*

1807.

KENMAN v. BEAN.

The Court were of opinion that there was no distinction in this respect between the two classes of cases, and referred to *Baker* v. *Cooper*, 6 *Term Rep.* 548. as an express authority to shew that the declaration could not be filed conditionally after the time for appearance was expired.

NORVILLE *v.* ST. BARBE.

June 1st.

In an action on a policy of insurance on a ship licensed by the *East India* Company to proceed for one voyage from *England* to the *Cape*, from thence to the *Pacific Ocean*, and North-west Coast of *America*, and there to sell the cargo from *London*, and trade and traffic and procure, and afterwards sell the produce or manufacture of those parts, and to proceed from thence to *Japan*, *Korrea*, and *Canton*, and there to dispose of the cargo procured on the North-west coast of *America*, and then return to *England*; (which licence was to be in force for three years.) The Court held that a ship which was lost in the *Pacific Ocean* after having abandoned all intention of proceeding to *Canton* was protected by the licence.

THIS was an action on a policy of insurance. The case was tried before Sir *James Mansfield* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* term, when the following facts appeared in evidence.

The policy, dated the 3d *July*, 1801, was upon the ship and cargo of the *Venus*, *Charles Bishop*, master, at and from the *Cape of Good Hope* to *Botany Bay*, *Port Jackson*, or all other ports and places in *New South Wales*, *New Holland*, *Vandiemen's Land*, or in the islands adjacent, and all or any ports and places backwards and forwards, or in any other manner beyond *Cape Horn*, all or any islands and all ports and places in the *East Indies*, *Persia*, *China*, or on the North-west Coast of *America*, and to and from all ports and places of whatsoever denomination wherever after her departure from the *Cape of Good Hope*, and at all times whensoever until her safe arrival and final discharge at *Canton*, with leave to sell, re-sell, barter, exchange and re-exchange property, and to load or unload in part or whole at all, every, or any port or place, without inquiring into the regularity or irregularity of her proceedings; to continue and endure during her abode there, and further until she should be arrived as above; with leave to touch and trade at all, any, or every ports and places in the *East Indies*, *Persia*, *China*, and

at

at all ports and places of whatever denomination or in whatever latitude or longitude, either in her outward or homeward-bound voyage, and that it should be lawful for the said ship to proceed and sail to and touch and stay at any ports or places whatsoever, particularly any port, place, or island between *Cape Horn* and the sea of *Kamtskatka*, and all islands after her departure from *Botany Bay* or *Port Jackson* of whatsoever description, or in any longitude or latitude, without reference to quality, condition, government or jurisdiction, either in her outward or homeward-bound voyage, or both, without being deemed in any manner a deviation or the least infringement, and without prejudice to the insurance; and after her final discharge on her homeward-bound voyage to *England*; valued on ship at 5800*l.*, and on goods as interest should be declared, either by advice from the *Cape of Good Hope* or elsewhere, with liberty to sell, barter, exchange, load or unload the interest in part or whole at all ports and places of whatever denomination, or in whatever latitude or longitude, and to return 20*l. per cent.* for all short interest at twenty guineas *per cent.* to return 16*l. per cent.* for such part of the interest as might cease with the ship's arrival at *Botany Bay* or *Port Jackson*. The *Venus* sailed from *England* in *January* 1801, under a licence from the *East India* Company by indenture, dated 29th of *October* 1800, between the Company and *George Bass*, *James Creighton*, and *Charles Bishop*, by which, after reciting the exclusive right of the Company and the statute 33 *Geo.* 3. c. 52. and that *Bass* and *Creighton* had formed a design to engage in an adventure from *London* to the *Cape of Good Hope*, and from thence into the *Pacific Ocean*, and to the North-west Coast of *America*, in sending the *Venus* thither for the purpose of disposing of a cargo of goods to be procured in *London*, and at the *Cape of Good Hope*, and of fishing, and purchasing and procuring goods, the produce and manufacture of those parts, and to proceed from thence to the isles of *Japan*, and the coasts of *Kor-*

1807.

NORVILLE v. ST. BARBE.

rea and *Canton;* and had applied to the Company for licence to carry on the said trade; the Company granted to *Bass*, *Creighton*, and *Bishop*, together with all persons necessary to navigate the *Venus* and manage the trade, full and free liberty, licence, power and authority, to proceed for one voyage with the said ship from *England* to the *Cape of Good Hope*, and from thence into the *Pacific Ocean*, and to the North-west Coast of *America*, and there to sell and dispose of the cargo to be carried in the said ship from *London*, and to fish, trade, and traffic, and to procure and afterwards sell and dispose of such goods, wares, and merchandizes, as should be the produce or manufacture of those parts, and to proceed from thence to the isles of *Japan*, and the Coasts of *Korrea* and *Canton*, and there to dispose of their cargoes procured on the North-west Coast of *America*, and then to return to *England*, subject to the covenants and restrictions thereinafter contained. *Bass* and *Creighton* then covenanted within fourteen days after the sailing of the ship to deliver to the Company's secretary a correct list of all persons and goods on board under a penalty of 1000*l.*; that the ship should proceed to the North-west Coast of *America* before she went to *Japan*, *Korrea*, and *Canton*. And it was provided that the ship should not go to any place in *China* but *Canton*, or to any place to the westward of the river of *Canton*, on pain of being deemed trading within the Company's limits without licence, except in case of unavoidable accident. And they covenanted that within forty-eight hours after the ship's arrival at *Canton*, or other place where the Company should have a settlement, factory, or resident, the master should deliver a true list of all persons on board, and an account of what had become of all others who sailed from *England*, and a true account of all the goods and stores on board, and permit the ship to be searched; that the master should keep a log-book, and within thirty days after his return to *England* produce it to the Court of Directors; that no person

person sailing with the said ship should remain within the Company's limits after the departure of the said ship; that it was provided that the licence should not authorize the selling or disposal of any goods the produce of *Europe* in *China;* that all money to be received in *China* should be paid into the Company's treasury for bills to be drawn on the court of Directors at 365 days; that the licence should not authorize the shipping any goods at *Canton* except sea stores, nor the bringing to *Europe* any goods the produce of *China*, or other goods except as before mentioned, nor the carrying any goods except as aforesaid to *North America* or the *West Indies*, nor the selling any goods except as aforesaid to any person, or the delivery of any goods except as aforesaid to any other ship for the purpose of being brought to *Europe* or carried to *North America* or the *West Indies:* that three days before the sailing of the ship from *Canton*, or other place where the Company should have a resident, the master should deliver a true list of all goods shipped or to be shipped at that place, and that the Company's servants should be at liberty to search; and that no person belonging to any of the Company's ships should be received on board without the express consent of the commander of such ship. *Bass*, *Creighton*, and *Bishop*, then covenanted duly to pay all customs and fees at *Canton*, and comply with all other regulations of the *Chinese* Government, and to observe various other rules for the conduct of the ship and crew at *Canton;* that no person engaged in the adventure should pay any money into the hands of any foreigners or foreign company, or borrow from or sell to them at *Canton*, or on the coasts of *Japan* or *Korrea*, without the Company's licence; that if the *Venus* should be lost, and the adventure should be pursued in any other ship, such ship should be liable to the same covenants. And it was provided that the licence should not authorize the sending any ship but the *Venus* within the Company's limits, nor the *Venus* for more than one voyage,

nor

1807.

NORVILLE v. ST. BARBE.

nor authorize her to remain within the Company's limits more than three years from the date of the licence. And that on her return from within the limits, or the expiration of three years, whichever should first happen, the licence should cease. The *Venus* arrived at *Botany Bay* in *October* 1801, after which she sailed to *Otaheite* for a cargo of pork, and returned to *Botany Bay*, and again sailed from thence in *February* 1803, but was never heard of any more.

On the part of the Defendant it was contended, that it was evident from the date of the ship's leaving *Botany Bay* the second time, that the voyage described in the licence and the policy had been abandoned.

The Lord *Chief Justice* left it to the jury to consider whether it was possible for the ship, after leaving *Botany Bay* the second time, to go to the North-west Coast of *America*, from thence to *Canton*, and get out of the limits of the *East India* Company's charter on her return to *Europe*, within the three years limited by the licence. The jury found a verdict for the Plaintiff.

A rule having been obtained, calling upon the Plaintiff to shew cause why this verdict should not be set aside and a new trial had, founded not only upon the evidence at the trial, but upon a letter of the captain not produced at the trial,

Shepherd and *Best* Serjts. now argued in support of the rule. The voyage insured would have been altogether illegal, being contrary to the exclusive privilege of the *East India* Company, were it not for the licence granted by the Company. And any insurance upon such a voyage would be illegal and void; *Camden* v. *Anderson*, 6 *Term Rep.* 723. [1]Unless, therefore, the licence has been strictly complied with the assured cannot recover. The *termini* of the voyage described in the licence are *England* and *Canton*. The licence authorizes one voyage only, viz. from *England* to the *Cape*, from thence to the

1 *Pacific*

1807.

NORVILLE v. ST. BARBE.

Pacific Ocean and the North-west Coast of *America*, there to sell the cargo carried from *London*, and from thence to the isles of *Japan* and the coasts of *Korrea* and *Canton*, there to dispose of the cargo procured on the North-west Coast of *America*. The *terminus ad quem* was *Canton*; and if this *terminus* ever was abandoned, the terms of the licence were violated. It is true that an intended deviation will not vitiate a policy, if the loss takes place before the ship arrives at the dividing point. *Foster* v. *Wilmer*, 2 *Stra.* 1249. *Carter* v. *Royal Exchange Assurance Company*, *ibid.* *Kewley* v. *Ryan*, 2 *H. Bl.* 343. In the case of a deviation the *termini* of the voyage remain; though the course by which the *terminus ad quem* is sought be changed. But where the *terminus ad quem* is changed, it is not a deviation but an abandonment of the voyage. And such an abandonment, at whatever time it takes place, whether before or after the arrival of the ship at the dividing point, discharges the underwriters. *Wooldridge* v. *Boydell*, *Doug.* 16. *Way* v. *Modigliani*, 2 *Term Rep.* 30. In *Murdock* v. *Potts*, *Park's Insur.* 299, where the insurance was on freight at and from *Bourdeaux* to *Virginia*, the assured failed to recover, because it appeared that the goods were not consigned to *Virginia*, but that the ship was only to call there for orders. In the present case, if the captain did not intend to go to *Canton* with a cargo obtained on the North-west coast of *America*, he abandoned the voyage insured; and it is evident from the dates, and also from the letter, that he could not have intended to do so. The licence was granted upon condition that the cargo obtained on the North-west Coast of *America* should be sold at *Canton*. It was a benefit to the Company that it should be sold there, and if the condition has been violated the voyage is illegal. If *Canton* is not to be considered as the *terminus* of the voyage in the policy, there is no *terminus ad quem*, and the policy must be considered as a time policy for three years, which is void, it being unlawful

1807.

NORVILLE v. ST. BARBE.

unlawful to effect any time policy for a greater length of time than one year. 35 *Geo.* 3. *c.* 63. *s.* 12.

Bayley Serjt. *contrà.* The single question is, Whether the captain was bound to go to *Canton?* There is no clause in the licence which imposes any such condition. The chief object of the licence seems to have been to impose certain restrictions in case the ship should go to *Canton.* The settlements of the *East India* Company are all situated to the westward of the river of *Canton;* and the licence expressly prohibits any trade to the westward of that river. But the company have a factory at *Canton,* and, therefore, in case of the arrival of the ship at that particular place, it is stipulated that certain conditions shall be complied with. Under this licence the captain was at liberty either to return to *England* after trading to the *Pacific Ocean,* or if he went to the North-west coast of *America* he was to proceed to the isles of *Japan, Korrea, or Canton,* and there dispose of the cargo obtained on the North-west coast of *America.* The *terminus ad quem* of the voyage, therefore, was either *England* or *Canton.* There is nothing in the licence which restrains the sale of the cargo obtained in the *Pacific Ocean* to any particular place. The captain might, therefore, return to *England* with it; and then the licence would have ended. If the captain was bound to proceed to *Canton* because *Canton* is mentioned in the licence, it may equally be contended that he was bound to fish, and to do every other act to which the licence applies, and to go not only to *Japan,* or *Korrea, or Canton,* but to all three of them. The trade in the *Pacific Ocean* was not likely to interfere with the trade of the Company, and therefore no restrictions are imposed; but the trade at *Canton* might be injurious to the interests of the Company, and therefore regulations are made. If indeed the captain goes to *Canton,* he must previously go to the North-west coast of *America,*

America, and take in a cargo there. The object of this clause (*a*) is evidently to prevent the sale of the cargo from interfering with the Company's sales at the same place.

Cur. adv. vult.

On this day Sir JAMES MANSFIELD, Ch. J. delivered the opinion of the Court.

" This is an action against the Defendant as underwriter upon a policy of insurance of such a description as, I believe, never before was put on paper, and, I hope those who are concerned in getting, or in making insurances, will, in future, have their contracts made in a form rather more intelligible. What the voyage was, that was insured on this policy, it is next to impossible to say; but, however, that policy is certainly to be construed in favour of the assured, and most strongly against the assurer, the underwriter. It was supposed at the trial, and probably it was so intended to be by the parties, that the voyage in question was a voyage to *Canton*, and that this was an insurance simply from the *Cape of Good Hope* to *Canton*. Now upon reading the policy we find it is from the *Cape of Good Hope* to *Botany Bay*, *Port Jackson*, or all ports and places in *New South Wales*, *New Holland*, *Vandiemen's Land*, or the islands adjacent, and all or any ports and places backwards and forwards, or in any other manner beyond *Cape Horn*, all or any islands, and all ports and places in the *East Indies*, *Persia*, *China*, or on the North-west coast of *America*; and to and from all ports and places of whatsoever denomination wherever after her departure from the *Cape of Good Hope*, and at all times whatsoever until her safe arrival and final discharge at *Canton*." Stopping here one would suppose that the voyage in contemplation was, clearly, to end at *Canton*.

(*a*) 33 *Geo.* 3. *c.* 52. *s.* 78.

Then

1807.

NORVILLE v. ST. BARBE.

Then it goes on—"With leave to sell and re-sell, barter, exchange and re-exchange property; and to load or unload in part or whole, at all, every, or any port or place, without inquiry into the regularity of her proceedings." And then, "to continue and endure, during her abode there, and further, until she shall be arrived as above." That must mean until her arrival at *Canton*. "With leave to touch and trade at all, any, or every ports and places in the *East Indies*, *Persia*, *China*, and at all ports and places of whatever denomination, or in whatever latitude or longitude, either on her outward or homeward-bound voyage." Now what could be meant by these words if *Canton* was her place of final discharge? Nor does it stop there, but it goes on again, "It shall be lawful to proceed and sail to, and touch and stay at any ports and places whatsoever, particularly any port, place, or island between *Cape Horn* and the sea of *Kamtskatka*, and all islands after her departure from *Botany Bay* or *Port Jackson*; of whatever description; or in any longitude or latitude; without reference to quality, condition, government, or jurisdiction, either in her outward or homeward-bound voyage, or both, without being deemed, in any manner, a deviation, or the least infringement, and without prejudice to this insurance." And after her final discharge she is insured in her homeward-bound voyage. Now, as I have said already, this instrument, that is, this policy of insurance, is to be taken most strongly against those who make it, and most favourably for those to whom it is made, as every contract is. A great deal was said, at the trial, and very properly said, certainly, that this policy must be understood with reference to the known course of trade of ships that go into the *Pacific Ocean*, into which none can legally enter without licence of the *East India* Company; the terms of that licence, and the course of this trade, must be taken into consideration on this insurance, and the consequence

of

1807.

NORVILLE v. ST. BARBE.

of that would be, with respect to this wild contract, the like to which no one, I believe, ever saw before, that after the three years were expired, to which the licences of the *East India* Company are always limited, the insurance would be at an end; for if not, it would be a still wilder contract than it appears to be on the face of it. At the trial the only question was, Whether this ship had abandoned her voyage to *Canton?* and I left it to the jury to consider whether the captain had or had not abandoned that voyage. The jury, on the evidence before them, were of opinion, and I think rightly, that the captain had not abandoned that voyage. Now application is made for a new trial on the ground that a letter has been since found. But on a motion for a new trial, on account of the evidence supposed to be afforded by that letter, the nature of the evidence is to be considered, and we are to consider whether the Court should give any aid to such a defence now, if it appears that for want of activity at the trial, it happened not to have been then obtained. Now with regard to the abandonment of the voyage, it was spoken of and reasoned upon as a deviation, and if the single question was, whether this was a deviation, it would be no objection to the Plaintiff's recovery upon this policy, because if the underwriter has been absurd enough to give a man a right to trade all over the world, and to go from place to place, either on the outward or homeward-bound voyage, or both, without being deemed in any manner a deviation or the least infringement, and without prejudice to his insurance, there is no reason why he should not so bind himself. In the first place, therefore, as it struck my Brother *Chambre* when this point was first argued, we should consider whether if the captain had abandoned all thought of going to *Canton*, that would be out of the terms of the licence, and his trading from that time would be illegal. And, 2dly, Whether the evidence in this case is so decisive in favour of such an objection, that a new trial ought

1807.

NORVILLE v. ST. BARBE.

ought to be granted? Now it is, I think, plain enough that the voyage in contemplation of the party when he went from hence was to go to *Japan*, *Korrea*, or *Canton*. I think that appears from the recital of the licence; it appears also from the terms of the licence, as well as the contemplation of the party; for there is a covenant to go to the North-west coast of *America* before the ship goes to *Japan*, *Korrea*, or *Canton*; and as to what is said about trading and fishing and so on, the meaning is plain that the object in view was to trade in the *Pacific Ocean*, thereby to raise funds to enable the captain, by disposal of the cargo, to go to *Canton*; because that, I think, from the several parts of the policy itself, seems to be clearly the voyage in contemplation. With that voyage in contemplation this licence is obtained, in which there is a covenant prohibiting the captain from carrying any goods which he purchased in the *Pacific Ocean* to *Europe*; but then the question to be considered is, Whether, in case of an accident which prevented the captain from disposing of his cargo in such a manner, or for such money as would enable him to proceed to the North-west coast of *America*, and there purchase a cargo for sale at *Canton*, he could remit that money to *Europe*? Now I see nothing in the licence restraining him from so doing. He cannot remit money received in *China* to *Europe* but through the treasury of the *East India* Company; but I imagine that in the *Pacific Ocean*, with such an adventure in prospect as this ship sailed with, for want of a market it might be impossible for him to raise any funds to make it worth his while to pursue his voyage to *Canton*; and if by accident of a bad market, or otherwise, he could not raise a fund to purchase furs, or whatever goods are to be purchased on the North-west coast of *America*, to make it worth his while to go to *Canton*, there is nothing in the licence which restrains him from remitting money to *England*. That being so, and it appearing now to us,

on

1807.

NORVILLE

ST. BARBE.

on the best consideration we can give to the case, that there is no covenant which enforces the sailing of this ship to *Canton;* but, on the contrary, it being a licence with covenants to *allow* this ship to go to the North-west coast of *America*, and to trade in the *Pacific Ocean*, and to go to *Canton*, *&c.* and not imposing upon the captain, at all events, the necessity of going there, we think, as there is no express covenant compelling him to pursue a voyage to *Canton*, so there is nothing in the licence by which it must of necessity be implied that he was under an obligation to go there; and unless it was absolutely necessary to make that implication, we think it is not to be made, because in the mouths of these underwriters it is an ill-favoured objection, contrary to their own contract, but of which they wish to avail themselves, in order to set aside this insurance, after having taken a large premium, and having gone as far as they could to authorise this trading. In their policy they say, that it not only "shall be without inquiry into the regularity or irregularity of her proceedings, but also without regard or reference to quality, condition, government, or jurisdiction." In such a case, therefore, it does not appear to us that we ought to make any implication or intendment on that licence beyond what is required by absolute necessity. [His Lordship then commented upon the evidence given at the trial, and also on the letter since produced; and concluded].—We have no right to go into conjecture to the prejudice of the contract entered into by this policy. Nothing is to be presumed in favour of such an objection as this urged in behalf of the underwriter upon this policy. We are therefore of opinion that no new trial should be granted in this cause.

Rule discharged.

1807.

June 1st.

HUGGETT *v.* MONTGOMERY.

If one ship run against another by the negligence of the pilot while the owner is on board, the remedy against the owner is an action on the case.

THIS was an action of trespass, and the declaration stated that the Defendant "with force and arms drove a certain ship or vessel whereof the said Defendant was then and there commander, to, upon, against, and over a certain boat of the Plaintiff," and sunk her, *damno*, &c. *contra pacem*, &c. The cause was tried at the *Guildhall* Sittings after last *Easter* Term, when it appeared that the Defendant was master and owner of the vessel by which the injury to the Plaintiff's boat was committed; but that he, though on board at the time, did not give the order which caused the accident, but the pilot did; that it was nine o'clock at night in the month of *September* when the accident happened; that the vessel would not obey her rudder; and that it was owing to no design or wilful act of any person on board. Sir *James Mansfield* Ch. J., who tried the cause, left it to the jury to say whether the accident was owing to the mere force of the wind, or to negligence. The jury were of opinion that the accident arose from negligence, and gave a verdict for the Plaintiff.

A rule *nisi* having been obtained on a former day for setting aside this verdict and entering a nonsuit, on the ground that the action should have been an action on the case, and not trespass,

Vaughan Serjt. now shewed cause, and urged, that supposing the accident to have arisen from negligence, and not from any wilful act, still no case could be cited in which such an accident had been held to be the subject of an action on the case where the owner had been

on

1807.

HUGGETT v. MONTGOMERY.

on board at the time. He observed, that the declaration in this case charged the act to have been done with force and arms, and that if the act be an act of force proceeding from the Defendant himself, it is trespass, if the injury be immediate; and he read the words of Lord *Ellenborough* in *Leame* v. *Bray*, 3 *East*, 599. where he comments upon the case of *Ogle* v. *Barnes* (*a*), which was an action on the case for running down a vessel, and says, "I incline to think it was rightly decided, and yet there are words which imply force by the act of another; but, as was observed, it does not appear that it must have been the personal act of the Defendants: it is not even alleged that they were on board the ship at the time; it is said indeed, that they had the care, direction, and management of it, but that might be through the medium of other persons in their employ on board. That therefore might be sustained as an action on the case, because there were no words in the declaration which necessarily implied that the damage happened from an act of force done by the Defendants themselves." He then urged, that in this case that circumstance which was wanting in *Ogle* v. *Barnes*, was supplied by the presence of the owner on board the vessel at the time of the accident.

Shepherd and *Best*, Serjts. in support of the rule observed, that the present case differed extremely from *Leame* v. *Bray*, because here the Defendant, though on board the vessel, did not give the order which occasioned the accident, but the pilot did, whereas in *Leame* v. *Bray* the Defendant was driving the carriage which injured the Plaintiff's carriage. They urged that the mere circumstance of the owner of a ship being on board could not make that trespass which would otherwise be the subject of an action on the case, and they instanced

(*a*) 8 *Term Rep.* 188.

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1807.

HUGGETT
v.
MONTGOMERY.

the fact of an accident taking place while he was below and in bed.

The Court expressed an opinion upon the first opening of the case, that under the circumstances in which this accident happened trespass could not be maintained against the Defendant; and said, the case differed from *Leame* v. *Bray* in the point to which their attention had been drawn by the Defendant's counsel, intimating at the same time doubts as to the authority of that case. And

CHAMBRE, J. observed, that in cases of this kind it would be difficult to sustain the proposition that a master could be liable to an action of trespass for a negligent act done by his servant in the course of his employment, for which the servant himself would also be liable in that form of action.

Rule absolute.

1807.

(IN THE EXCHEQUER-CHAMBER.)

IGGULDEN *v.* MAY. In Error.

June 5th.

A covenant in an indenture of lease to grant a new lease with all covenants, grants, and articles as in the said indenture contained, does not bind the lessor to insert a covenant of renewal in the renewed lease.

COVENANT by the Plaintiff, as assignee of the original lessees, against the Defendant, as assignee of the original lessors, on a lease for 21 years, granted the 29th *Sept.* 1783. The covenant which gave rise to the present action was as follows: "that the said *J. D.* (the original lessor), his heirs and assigns, at the end of 18 years of the said term of 21 years, or before, upon request to him or them made by the said *J. S.*, *E. F.*, and *S. S.* (the original lessees), their executors, &c. and at the costs and charges of the said *J. S.* &c. their executors, &c. shall and will make, seal, and deliver unto the said *J. S.* &c. and their executors, a new lease of the said 27 perches of ground, with the appurtenances, for the like fine or consideration of 5*l.* 8*s.* for the like time and term of 21 years, at the like yearly rent of 6*s.* 9*d.* payable as is aforesaid, with all covenants, grants, and articles as in this indenture are contained." The question raised by the pleadings upon this covenant (*Vide* 7 *East*, 237.) was, Whether a perpetual renewal was reserved by it to the lessees and their assigns, or only one renewal, the Plaintiff alleging that the covenant in question had been introduced "in various other cases before then successively made and executed on renewals from time to time granted," and assigning as a breach the Defendant's refusal to grant a new lease with "such covenant for renewal as is contained" in the lease of the 29th *Sept.* 1783.

The Court of King's Bench having given judgment for the Defendant in *Hilary* term 1806 (*a*), thereby deciding

(*a*) 7 *East*, 237.

1807.

IGGULDEN v. MAY, in Error.

that the Plaintiff was not entitled to a new lease including the covenant for renewal, this writ of error was brought upon that judgment.

Best Serjt. for the Plaintiff in error. A covenant for perpetual renewal is not contrary to law, and the only question that can arise upon such a covenant as that contained in the present lease is, Whether it was intended to be a covenant for perpetual renewal? In order to learn the intention of the original parties to the lease it is material to look at the premises leased, and the covenants contained in the lease. Now in the present instance, though there are buildings upon the land demised, yet there is no covenant to deliver those buildings up at any time in good repair. The original lessor therefore evidently considered that he had parted with the premises for ever; and to put a different construction on the lease is to strike out the covenant altogether. The case of *Cooke* v. *Booth*, *Cowp.* 819. is an express authority for the Plaintiff in error, and that case has never been over-ruled. The cases of *Bridges* v. *Hitchcock*, 5 *Brown's Parl. Cas. p.* 6. oct. ed. and *Furnival* v. *Crew*, 3 *Atk. p.* 83. are authorities to the same effect; and with respect to *Hyde* v. *Skinner*, 2 *P. Wms.* 196. which has been relied on for the Defendant in error, *Lord Hardwicke* observed of it in *Furnival* v. *Crew*, that it was hardly an authority in any case. In *Tritton* v. *Foot*, 3 *Bro. Ch. Cas.* 636. Lord *Thurlow* looked at all the circumstances of the case in order to collect the true intention of the original parties to the lease. If that be done in this case, these circumstances will shew that the Plaintiff in error is entitled to have the covenant for renewal in the new lease.

Abbott for the Defendant in error was stopped by the Court.

Sir

Sir JAMES MANSFIELD, Ch. J. of the Common Pleas. —It is the opinion of all the Judges present (except Mr. Baron *Wood*, who, having been engaged in this case when at the bar, declines giving any opinion), that the judgment of the Court of King's Bench must be affirmed. The question is, Whether we can imply a covenant for a perpetual renewal? and we all think that no such implication can be made in this case, and that the renewals of the lease, which have heretofore taken place, including the covenant in question, cannot be used by way of argument on this occasion. It is true that similar renewals were allowed to operate upon the judgment of the Court of King's Bench in *Cooke* v. *Booth*, but we think that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of that deed. Suppose the original lessor to have declared in the presence of 50 witnesses that he intended to bind himself by the lease to a perpetual renewal, his declaration could not have been allowed to alter the construction of the lease itself. If so, why should the subsequent renewals, which are not evidence either so strong or so unequivocal as the declaration of the lessor, be allowed to alter the construction. Indeed if they were admitted, this singular consequence might follow, viz. that at the end of the second term of 18 years after the granting of the lease the operation of the lease would be different from what it was immediately after the execution of the lease. It is true that the reserved rent is small, but in no part of the lease, except the covenant to renew, upon which this question arises, are there any words which can be deemed to refer to any future lease; and with respect to that covenant, the whole argument turns upon the words "all covenants, grants, and articles." For the Plaintiff in error it is contended that these words must include a covenant for renewal in the new lease. The plain meaning of the deed is, that the lessor grants a

1807.

IGGULDEN v. MAY, in Error.

a lease for 21 years, and at the end of that term engages to grant another lease for a like term in the same form. Independent of cases no man could doubt that such was the intent of the lessor. It has been argued both at law and in equity, (*a*), that the word "covenants" cannot be satisfied unless the covenant for renewal be included in the new lease; but the answer is, that there are other covenants sufficient to satisfy that term, which must be included. Suppose the lease to have contained a covenant to grant a new lease *in the same form*, could it have been contended that by implication the covenant for renewal must have been included? The case of *Cooke* v. *Booth* is the only authority in favour of the Plaintiff in error, a case which has been impeached upon all occasions, and in which the Court of King's Bench were misled by the renewals stated in the case sent from the Court of Chancery. The case of *Bridges* v. *Hitchcock* does not apply; because there the lessee might have required a new lease for 9000 years under the covenant to grant such further lease as the lessee should require; and *Furnival* v. *Crewe*, and the other cases, had words pointing at renewals from time to time. Indeed, all the authorities shew that the Judges by whom they were decided never thought of implying a covenant for a perpetual renewal.

Judgment affirmed.

(*a*) See this case, 9 *Ves. jun.* 325.

1807.

MEREDITH *v.* HODGES.

June 8th.

INDEBITATUS assumpsit against *Robert Hodges*. —Plea; that the Defendant was baptized by the name of *William Robert*. Replication, that the person against whom the Plaintiff sued out the writ appeared by the name of *Robert Hodges* to the said writ sued out against him by the Plaintiff, to wit, at, &c. as by the recognizance of bail entered into for him the person so sued, and now remaining of record in the court of our lord the king of the Bench at *Westminster*, may more fully and at large appear, and this he is ready to verify by the record; and the Plaintiff says that the said plea of the person so sued, pleaded in manner and form aforesaid, and the matters therein contained, are not sufficient in law to quash the said writ, and the Plaintiff is not under any necessity nor bound by the law of the land to answer the same; and prays judgment if the person sued as aforesaid ought to be admitted by his said plea to quash the writ against the record, &c. The Defendant then prays that the recognizance may be enrolled, and it is enrolled *in hæc verba*. "The sheriff is commanded to take *Robert Hodges*, and to have his body in 15 days of *Easter* in a plea of *quare clausum fregit* and *ac etiam* on promises. And now at this day come *Thomas William Hodgson* and *William Street*, and acknowledge to owe, &c. upon condition that if judgment should be given against the said *Robert*, then the said *Robert* shall satisfy the damages which shall be adjudged against the said *Robert* in the plea aforesaid, or shall render his body."

Whereupon the Defendant demurred. Joinder in demurrer.

Defendant is estopped by the recognizance of bail entered into for him by the name in which he is sued from pleading a misnomer, though he himself be no party to the recognizance.

Bayley

1807.

MEREDITH v. HODGES.

Bayley Serjt. in support of the demurrer. The replication is founded upon an estoppel: and so long as it was the practice to make Defendants join in the recognizance of bail, such a replication may have been good, but now that it has become the practice to omit his name, as has been done in this case, the recognizance is the act of the bail only, and cannot bind the Defendant himself, and preclude him from pleading a misnomer.

Onslow Serjt. *contrà*, mentioned the case of Sir *Hugh Smithson* v. *Smith*, *Willes*, 461.; but was stopped by

The Court, who said the act of appearing by putting in bail must be considered as the Defendant's own act. He procures the bail: when they are put in *comperuit ad diem*. And they referred to the case of *Stroud* v. *Lady Gerrard*, 1 *Salk*. 8. where it was holden that an appearance by common bail estopped the Defendant from pleading a misnomer.

Judgment *quod respondeat ouster*.

June 8th.

MAX *v.* ROBERTS and eight Others.

In an action on the case upon the delivery of goods to several joint owners of a ship to be caried to *A.* for freight, alleging a deviation; if the Plaintiff fail in proving all the Defendants to be owners he cannot recover, even against those whom he proves to be owners.

THIS was an action on the case.

The declaration stated that the Defendants were owners of a certain ship called the *Draper*, bound from *Liverpool* to *Waterford;* that one *John Taylor* shipped, on account of the Plaintiff, divers goods to be carried to *Waterford*, the dangers of the seas and navigation excepted, and delivered to the Plaintiff, he paying freight; that *Taylor* effected an insurance on the said goods, lost or not lost, at and from *Liverpool* to *Waterford;* that it became and was the duty of the Defendants as owners to cause the ship to proceed upon the said voyage from *Liverpool*

1807.

MAX
v.
ROBERTS
and Others.

Liverpool to *Waterford* without any unnecessary deviation from the course of the said voyage; and that the Defendants, not regarding their duty, did not cause the said ship to proceed upon the voyage from *Liverpool* to *Waterford* without making any unnecessary deviation from the course of the said voyage, but on the contrary thereof wrongfully permitted the said ship to make an unnecessary deviation from the course of the said voyage from *Liverpool* to *Waterford* with the said goods on board, viz. from and out of the course of the said voyage into a certain bay called *Portinllan Bay;* that while the said ship was in the said bay she was by stormy and tempestuous weather driven on the rocks, and the goods spoiled; whereupon the Plaintiff, but for the deviation, would have recovered payment for the damage sustained by virtue of the policy of insurance; that by means of the deviation, and no other cause, the insurance became ineffectual, and the underwriters were discharged; and in consequence thereof the Plaintiff failed in his recovery in certain actions brought by him against the underwriters without knowing of such deviation.

Plea, not guilty.

At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* Sittings after last *Easter* term it appeared, on production of the ship's register, that eight only of the Defendants' names were registered, and one of them, who was a woman, had since married the ninth. A general verdict, however, was taken for the Plaintiff, with liberty to move that a nonsuit might be entered.

Accordingly a rule *Nisi* for that purpose having been obtained,

Shepherd and *Best* Serjts. shewed cause, and contended that as this action was not founded on contract, but was an action of tort, the Plaintiff was entitled to his verdict against seven Defendants; that the action was for a misfeasance;

1807.

MAX
v.
ROBERTS
and Others.

feasance; that the words "without unnecessary deviation" were not in any express contract; that the case of *Govett* v. *Radnidge*, 3 *East*, 62. expressly warranted the verdict; and that if the Court should consider the case of *Powell* v. *Layton*, *ante*, 365. as at variance with *Govett* v. *Radnidge*, by allowing the verdict to be entered against the seven, they would leave the point open upon the record in arrest of judgment.

Cockell Serjt. relied on *Powell* v. *Layton*.

Sir JAMES MANSFIELD Ch. J. If this action be founded in contract there ought to be a nonsuit or a verdict for the Defendants. How does the duty arise? By the merchant agreeing to pay freight, and the owners to convey the goods. Is not that a contract? What duty had the owners except what arises by contract? It would be a very strange thing if the rights of the parties were to be changed by the Plaintiff putting the words "undertake and promise" into his declaration. The Court of King's Bench have certainly overturned the case of *Boson* v. *Sandford*: and in overturning that case they thought it of less authority, because they thought that the objection of all the owners not having been joined ought to have been pleaded in abatement. But this does not appear to me to afford any ground for impeaching that case. For until the case of *Rice* v. *Shute* (*a*), it never had been decided that advantage might be taken of such an objection by plea in abatement; which opinion was afterwards confirmed in the case of *Abbot* v. *Smith* (*b*). There are cases in the Year-books (*c*) in which it was determined that in debt on simple contract, if all the joint debtors be not made parties it must be pleaded in abatement.

(*a*) 5 *Burr.* 2611.
(*b*) 2 *Blac.* 947.
(*c*) Vide 9 *Edw.* 4. 24. *b.* 10 *Ed.* 4. 5. *a.* *Bro. Brief.* 38. and 5 *Burr.* 2614. *Blac.* 950.

The

The action of *assumpsit* was established in *Slade*'s case, 4 *Co.* 92. *b.*; upon which the action of debt on simple contract was much discontinued: and from that time to the case of *Rice* v. *Shute* there never had been a plea in abatement upon the ground of all the joint contractors not having been made defendants; but it was always a ground of nonsuit, or of a verdict for the Defendant. It is therefore too much to say that the Judges in the case of *Boson* v. *Sandford* were wrong when they were only mistaken in the same manner as all other Judges had been before them. The question here is, Whether an agreement to carry goods from *Liverpool* to *Waterford* is not an agreement to carry them directly to *Waterford?* If the judgment in *Powell* v. *Layton* was erroneous, it was not so without consideration: and I cannot distinguish this case from that upon which we bestowed so much time.

HEATH and ROOKE Js. of the same opinion.

CHAMBRE J. This point has already been decided. It is not therefore open to argument in this court now. The case of *Boson* v. *Sandford* is reported in several books (*a*). In none of them is any *quære* made; nor any dissatisfaction expressed. It is cited in *Comyns's Digest*, and classed under the titles *Abatement*, *Joint Contractor*, (F. 8.); and in 1 *Dawers's Abr.* 8. Against this case is the authority of a recent case of great weight: but I am not convinced by that case that the judgment in *Boson* v. *Sandford* was wrong. The plea in abatement was not introduced immediately upon the establishment of the action of *assumpsit* in *Slade*'s case.

Rule absolute.

(*a*) *Skin.* 278. *Salk.* 440. 3 *Lev.* 258. *Carth.* 58. 3 *Mod.* 321. 1 *Show.* 29. 101. 2 *Show.* 478.

1807.

June 8th.

BAYLEY *v.* TUCKER.

If *A.* promise the bail in consideration of certain reasonable reward to render the Defendant within due time, according to the practice of the Court, and proceedings be commenced against the bail pending a writ of error: *A.* is not bound to indemnify the bail against such tortious proceedings. *Quære* Whether, if the declaration state the condition to be certain reasonable reward, evidence that a specific sum was agreed upon will be deemed a variance? *Semb.* not.

ASSUMPSIT. The declaration stated, that in consideration that the Plaintiff had retained the Defendant for the purpose of having one *Parsons* rendered in discharge of the Plaintiff, for certain reasonable fees, hire, and reward, to be thereupon paid to the Defendant; the Defendant undertook and promised that he would take proper and necessary steps to have and cause *Parsons* to be rendered to the prison of the *Fleet* in discharge of the Plaintiff and his recognizance in due and proper time, according to the course and practice of the Court of *C. B.*, and do his duty therein; and charged that the Defendant did not render the said *Parsons* in due time. There was another count, which stated the consideration to be 25*l.*

Plea, *Non assumpsit.*

At the trial before Sir *James Mansfield* Ch. J. at the *Westminster* Sittings after *Easter* term, it appeared that *Parsons* being sued in several actions by different persons, and the Plaintiff, together with another person, being bail in all the actions, the Defendant agreed to surrender *Parsons* in all the actions for 24*l.* 10*s.*, which was then paid to him, and he told the Plaintiff that he was safe; that the Defendant accordingly surrendered *Parsons* in all the actions except one, viz. *Hill* v. *Parsons*, in which a writ of error had been brought; that notwithstanding the writ of error *Hill* proceeded by *scire facias*, and after getting two *nihils* returned, took out execution against the bail; whereupon the present action was brought. A verdict was found for the Defendant upon the count which stated the consideration at 25*l.* and for the Plaintiff upon the other count, with liberty to the Defendant to move that a nonsuit might be entered.

Ac cord-

Accordingly a rule *nisi* for that purpose having been obtained,

Shepherd and *Vaughan* Serjts. shewed cause, and contended, 1st, that the Defendant was liable upon his undertaking, notwithstanding the writ of error; for that having engaged to surrender *Parsons*, he ought to have searched whether any proceedings were instituted against the bail, and that by omitting to do so he had exposed the bail to a suit; 2dly, that the payment of a specific sum, viz. 24*l.* 10*s.*, as the consideration did not preclude the Plaintiff from recovering under the count which described the consideration to be certain reasonable fees, hire and reward to be thereupon paid; for that the payment of that particular sum only ascertained what the parties deemed reasonable fees for surrenders in the actions; and it not being ascertained how much the Defendant was to have for each particular action, the Defendant was to have a reasonable proportion in each.

Best Serjt. *contrà* insisted, 1st, that the Defendant having undertaken to surrender according to the course and practice of the Court, was entitled to all the time which the practice allowed, and consequently was not bound to surrender pending a writ of error, since the bail could not be sued; and, 2dly, that the Plaintiff could not recover under the count stating the consideration to be reasonable reward, for under a count so framed in an action for the consideration, if the jury should think 24*l.* 10*s.* too little, the Defendant would be entitled to recover more, and yet the contract was for 24*l.* 10*s.* only.

Sir JAMES MANSFIELD Ch. J. I entertained some doubts upon this case at the trial, and there are some things upon which I continue to do so: but there is one ground

1807.

BAYLEY v. TUCKER.

ground upon which the Plaintiff must fail. I doubted at first whether if an attorney undertakes to render bail, a writ of error would afford him any excuse in an action against him by the bail for not rendering; and whether it is not his business to search, and ascertain whether any proceedings have been instituted. It seems, however, to be the sense of the Court that a promise to render in due time must mean, a render within that time in which the bail cannot regularly be prejudiced by the postponement. Now here, until the writ of error is disposed of, the Plaintiff has no right to take the Defendant in execution. A render in due time, therefore, must be understood to mean before the Plaintiff is entitled to take the principal in execution. On this ground the Plaintiff ought to have been nonsuited. And this being so, it will be unnecessary to consider the question arising upon the declaration.

HEATH J. I do not think the Plaintiff in this case entitled to recover. The declaration states a promise to render in due time in order to save the Plaintiff as the bail. There is a writ of error pending; and there ought to be no proceeding against the bail unless the writ of error was brought for delay: and even then the writ of error would not be a nullity, but only a ground of application to the Court for leave to sue out execution. *Hill* has taken out execution, which is a tortious act: he ought to have made an application to the Court. A warranty does not operate in respect of tortious acts, but only of rightful acts. And here the act by which the bail is prejudiced is tortious. The question of variance it is unnecessary to consider.

ROOKE J. We cannot consider the Defendant's contract as extending to indemnify the Plaintiff against the irregularities which might be committed by the Plaintiff in

1807.

BAYLEY v. TUCKER.

in the action against *Parsons*. And here *Hill* ought not to have sued out execution until he had gotten rid of the writ of error.

CHAMBRE J. The clear ground of nonsuit is, that the breach proved is not such as is alleged. The contract is to render within the time allowed by the course and practice of the Court. This gives the whole time allowed by the practice. Here the proceedings were suspended by a writ of error, and so long as they continued suspended the Defendant had a right to render, and might wait till the last moment. It is unnecessary to go further; though I do not think that the objection to the form of the contract stated would hold.

HEATH and CHAMBRE Js. also thought that under the particular circumstances of this case, the contract was not made with the Plaintiff, or at least not with him alone, but either with *Parsons* alone, or *Parsons* and both the bail.

Rule absolute for entering a nonsuit.

METCALF and Another *v.* SCHOLEY and Another.

June 9th.

An equitable interest cannot be taken in execution.

THIS was an action on the case, brought against the Defendants, as sheriff of the county of *Middlesex*, for returning *nulla bona* to a writ of *fi. fa.* against *George Coleman* the younger, indorsed to levy 600*l.*, besides poundage, &c.

Plea, Not guilty.

At the trial of the cause before Sir *James Mansfield* Ch. J. at the *Guildhall* Sittings after *Hilary* term 1806, a ver-

1807.

METCALF and Another v. SCHOLEY and Another.

a verdict was found for the Plaintiffs, subject to the opinion of the Court upon a case which stated in substance the same facts as were stated in the case of *Scott* v. *Scholey and Another*, in the Court of King's Bench, 8 *East*, 467.; the result of which was, that *George Coleman*, together with three other persons, was entitled to and had the use and enjoyment of an equitable interest for a term of years in the Little Theatre in the *Haymarket*, together with two messuages adjoining thereto, and the wardrobe, &c., the legal interest of which was vested in trustees for certain purposes; and that the beneficial interest of *George Coleman* therein, after payment of all incumbrances, was worth more than the amount of the Plaintiff's execution.

The case was argued in *Easter* term last by *Best* Serjt. for the Plaintiff, and *Bayley* Serjt. for the Defendant. After which the Court took time to consider of their opinion.

On this day, it being stated that the Court of King's Bench in the case of *Scott* v. *Scholey* had decided that an equitable interest could not be taken in execution,

Sir JAMES MANSFIELD Ch. J. said, Then we agree in opinion with the Court of King's Bench.

Per Curiam, Judgment for the Defendants.

1807.

June 9th.

MYERS *v.* KENT.

Trespass *quare clausum fregit*, justification under a *distringas* in a plea of trespass at the suit of *J. S.* against Defendant. Replication, that before the *distringas* issued against Defendant he appeared to answer *J. S.* in the plea of trespass in the said plea mentioned to the said writ sued out by *J. S.* for that purpose, to wit, a *clausum fregit* issued out of *C. B.*, *prout patet*, &c. Defendant rejoined *nul tiel* record.

Held that the record of appearance to a *clausum fregit* issued out of Chancery did not support the replication, and that the words which followed the *scilicet*, being material, could not be rejected.

TRESPASS for breaking and entering the Plaintiff's house.

Pleas, first, Not guilty; secondly, a justification under a writ of *distringas* issued out of the court of our lord the king of the Bench, on the 23d of *April* 46 *Geo. 3.* directed to the sheriff of *Surrey* in a plea of trespass at the suit of *J. S.* against the Plaintiff.

Replication; that the said writ of *distringas* in the said plea mentioned did issue out of the said court of our said lord the king of the Bench, and that although it bore *teste* and appeared to have issued on the 23d of *April*, 46 *Geo. 3.*; yet in truth the same did not really issue before or until the 23d of *May*, 46 *Geo. 3.*; and that before the said writ of *distringas* had really and truly issued, to wit, on the 16th of *May*, in *Easter* term 46 *Geo. 3.*, the Plaintiff appeared before his Majesty's Justices at *Westminster* to answer to the said *J. S.* in the plea of trespass in the said plea mentioned, and to the said writ sued out by the said *J. S.* for that purpose, to wit, a certain writ of our said lord the king commonly called a *clausum fregit* before that time *issued out of the court of our said lord the king of the Bench* at *Westminster*, at the suit of the said *J. S.* against the Plaintiff; and returnable before our said lord the king's justices at *Westminster* on the morrow of the Ascension in *Easter* term in the 46 *Geo. 3.* according to the exigency and tenor of the said writ, and the course and practice of the said court of the Bench, as by the record of the said appearance remaining in the said court of our said lord the king of the Bench at *Westminster* may more fully appear.

Rejoinder, That there is not any such record of the said appearance of the Plantiff to such writ as in the said

1807.

MYERS v. KENT.

said replication is mentioned remaining in the said court of our said lord the king of the Bench at *Westminster* as in the said replication is in that behalf alleged. And this, &c. wherefore, &c.

Surrejoinder; That there is such a record of the appearance of the Plaintiff to the said writ in the said replication mentioned remaining in the said court, &c. whereupon issue was joined, and a day given to produce the record.

The record of appearance being produced,

Shepherd Serjt objected that it did not support the replication, being a record of appearance to a writ of *quare clausum fregit* issued out of the Court of Chancery, whereas the replication stated it as an appearance to a writ out of the Common Pleas. He observed, that the words of the replication, which were put under a *scilicet*, could not be rejected, because they were material, and the replication might be demurred to without them; and that indeed if they were omitted the preceding words would refer to the writ of *distringas*, not to a *clausum fregit*, the writ to which the appearance was alleged being described as "the said writ," and not to "a certain writ."

Clayton, Serjt. *contrà*, contended that as there could be no appearance to any writ but a *clausum fregit* out of Chancery, the words which followed the *scilicet* might be rejected, and the replication construed to aver an appearance to answer *J. S.* in the plea of trespass mentioned in the plea, and to a writ sued out by him for that purpose: that matter which is repugnant to what precedes it may be rejected when put under a *videlicet*, as appears by *Cutler* v. *Southern*, 1 *Saund.* 113. and *Dakins'* case, 2 *Saund.* 290.; and that although the Defendant might have demurred to the replication because the writ

to which the appearance was averred, was stated to have issued irregularly, yet that having pleaded over, and tendered an issue, he could take no advantage of the irregularity, for which he cited *Knighton* v. *Norton*, 3 *Lev.* 311. and *Stutfield* v. *Somerset*, *Cro. Eliz.* 825.

Sir JAMES MANSFIELD, Ch. J. The justification in this case is under a *distringas*. The answer is, that before the *distringas* issued, which is process out of this Court, the Plaintiff appeared. This replication of an appearance would be nothing if it did not go on to shew, that the party appeared in an action, and under a proper writ, and he must state the writ to which he appeared, otherwise he might have appeared in another action, or without any process. He alleges that he appeared to a writ of *clausum fregit* issued out of this Court. The description being put under a *videlicet* will make no difference if it be material. This then being stated in the replication, and to be verified by a record, there is no such record: for the record produced is not such as is averred, namely, a record of an appearance to a *clausum fregit* out of this Court. There must therefore be judgment for the Defendant. As to the case of *Knighton* v. *Morton* it only proves, that where a party pleads a fact which must be tried by a jury, he waves his right to object that preceding matter triable by the record is not pleaded with a *prout patet per recordum*. The case of *Stutfield* v. *Somerset* was an action upon a bond with a condition that the Defendant should convey, and the Defendant having pleaded a feoffment which did not fulfil the condition, the other answered, that there was no such feoffment as pleaded; by which he admitted the sufficiency of the feoffment if it existed. These cases do not bear upon the present, where the only question is, Whether there is such a record as pleaded in the replication? There is no such record.

1807.

MYERS v. KENT.

HEATH J. I think so too. The rule respecting bad pleading being cured, does not apply to cases where a record is pleaded and issue is taken upon *nul tiel record.* In such case there can be no demurrer. The trial must be by comparing the record produced with the matter pleaded.

ROOKE J. I am of the same opinion.

CHAMBRE J. The issue is joined upon a fact to be tried by the record. If there be any error in the proceedings it may be taken advantage of in another way.

Judgment for the Defendant.

June 9th.

COBB, Clerk, *v.* SELBY.

A parson is not entitled to carry his tithes home by every road which the farmer himself uses for the occupation of his farm. *Semb.* that he may only use such road as the farmer does for the occupation of the close in which the tithes grew.

THIS was an action on the case brought by the Plaintiff as rector of *Ightham*, in the county of *Kent*, against the Defendant, as occupier of certain lands in that parish for obstructing a way by which the Plaintiff claimed a right to carry off the Defendant's farm the tithes of wheat grown in a close called the *Seven Acres.* At the trial before *Macdonald* Ch. B. at the last spring assizes for *Kent* it appeared, that the only way out of the *Seven Acres*, was a private occupation way over the Defendant's own land, which, after leaving a place called the *Moat* on the right hand, where the defendant's house, yard, and barns stood, continued nearly in a direct line over the Defendant's farm to the public road from *Tunbridge* to *Seven Oaks;* that the road obstructed turned to the right out of the same occupation way by the *Moat*, leaving it on the left hand, and continued over the Defendant's land to another part of the same public road, with which, after passing through a gate, called *Scatswood* gate, it communicated at *Ivy Hatch;* that the shortest way into the public road was by the first mentioned occupation way, but the shortest way to the rectory was by *Scatswood gate;*

and

1807.

COBB v. SELBY.

and that the gate leading into the *Moat* stood in the latter way, though but a few yards only from the former; that the tithes having been under composition for many years, no tithe waggon had used either way, but that 52 years ago the tithes were taken in kind for three years, and the rector's waggon then went by *Scatswood* gate; that the *Scatswood* road had existed as a beaten carriage road, longer than a witness 78 years of age could remember, and that *Scatswood* gate had never been known to be locked; that one *Taylor*, who occupied the *Seven Acres* before the Defendant, lived at *Ivy Hatch*, but rented a barn upon the *Scatswood* road near the *Moat*: that he and his workmen always used that road in the cultivation of the *Seven Acres*, and also in carrying the produce to market, but that the corn was never carried that way in the straw, but lodged in the barn near the *Moat* where it was threshed; that the Defendant always used the *Scatswood* road for the purposes of cultivating the lands on each side of it, of going to *Ivy Hatch*, and of carrying the produce of the *Seven Acres* to market at *Seven Oaks* and *Maidstone*; but that he never carried the corn in the straw beyond the *Moat*; that the hedges on the sides of the public road were so much overgrown that a waggon fully loaded could not pass without being subject to have the sheaves torn off, and that the land on both sides of it belonged to the Defendant; that the obstruction complained of was the locking a gate upon the *Scatswood* road, immediately beyond the gate leading into the *Moat*. His Lordship told the Jury that on this evidence the matter resolved itself into a point of law; that the parson had a right to use the same road for carrying his tenth part as the occupier had for carrying his nine parts when he had occasion to carry them off the premises; that there was no evidence of the tithes having at any time been carried by the public road, and that the Plaintiff had proved that for three years, 52

1807.

COBB v. SELBY.

years ago, the tithe corn was carried by the road which the Plaintiff claimed; that this road was proved to be a common track by which all other parts of the produce of the farm when carried in this direction were taken into the great road; and he thought the Plaintiff intitled to a verdict: which the jury gave with one farthing damages.

A rule having been obtained calling upon the Plaintiff to shew cause why a new trial should not be had, the above facts and opinion of the Lord Chief Baron were stated upon his report, who also referred to the case of *Bosworth* v. *Limbrick*, 3 *Gwillim on Tithes*, 1109.

Best Serjt. shewed cause. It was contended at the trial, that the rector had only a right to use that road which the farmer used for carrying the nine parts. But this rule cannot always apply, since the farmer and the rector, from the relative situations of their own houses, cannot always use the same road. In the present case the rector passes the farmhouse to get to the rectory; if therefore he was to be confined to the road used by the farmer for carrying the nine parts, he could have no road to the rectory. The sensible rule is this, that the rectory must have some road, and he may use any road used by the farmer himself, provided he does no mischief. The road claimed is a common beaten track, and was made so long ago that a witness 78 years of age could not remember its commencement. As the tithes had been many years under composition it was impossible to give more evidence of usage than was produced; and the only witness who could be produced proved that when the tithes were taken in kind 52 years ago, this road was used. It is clear that the Plaintiff had a right to go to the farmhouse; and if so, why was he bound to turn his waggon round and go the other road? He could do no injury to the farmer by going the road claimed, and the other road was further round. It is true, the

farmer

farmer may at any time stop up this road: and in such case it would cease to be a road. But while it continues a road, the rector has a right to use it. In an indictment tried at *Kingston* before Mr. *J. Heath* against some persons for obstructing excise officers; it was contended that the excise officers who were going to search a melting house, were using a road not commonly used for going to the melting house, but only for the dwelling house: the judge compared the case to that of tithes, which he said might be carried by any road used for the general purposes of the farm; and witnesses were examined to prove whether the family ever used the road for any purposes.

Bayley Serjt. was stopped by the Court.

Sir JAMES MANSFIELD Ch. J. The general rule which has been alluded to is confined to the close in which the tithes arise. It does not follow that the rector is entitled to go over any other lands of the farmer which are used by him as a road. Here is a road by the farmhouse down to the public road by which the parson might have gone. When the farmer brings his nine-tenths home he comes no further than his own farmyard: he has therefore no occasion to use that road to carry his nine parts. The question is, whether the parson has a right, because the farmer uses the other road, to use it too? There is scarcely any evidence in support of the claim. There could indeed be but little: and the general evidence is only that the road claimed was used by the farmer. The question has never been submitted to a jury. The Plaintiff therefore must maintain this point, that whatever road the farmer uses for his own convenience and occupation of his farm, though not the usual road from the close in question, and though there is another road, the parson may use also. I never thought that

1807.

COBB v. SELBY.

that the parson in taking his tithes had a right to use any road, but that which the farmer used in taking his nine parts: I never supposed that the parson had a right to use any other road because the farmer used it for other purposes. In this case the road claimed by the Plaintiff is not used by the farmer for carrying his nine parts, and there is another road which the parson may use. The tithe has been under composition; and the public road is bad. I do not see however how the Plaintiff can claim the road in question except by prescription; he does not do that, and there is very little evidence to support it. The case was treated at the trial as a matter of law; that the parson had a right to use any road used by the farmer. I think therefore that there should be a new trial.

HEATH J. I cannot accede to the doctrine contended for, though I agree to the doctrine that the parson may use the same road that is used for the nine parts. I think that the parson should have gone the nearest way to the public road. The farmer may stop up the road if he thinks fit: or he may sell any part of it. The Chief Baron did not leave the case to the jury, but treated the matter as a question of law. I think therefore that there should be a new trial.

ROOKE J. I am of the same opinion.

CHAMBRE J. A farmer often uses ways in a variety of directions leading to the public road. If the parson be entitled to any of them it may occasion great inconvenience. It appears to me, that the facts stated in the case before Lord Chief Baron *Eyre* (*Bosworth* v. *Limbrick*) tend to shew the inconvenience which might arise. I think that the rule goes no further than this that the tithe owner is entitled to make use of the road ordinarily used,

used, for the ordinary occupation of the close in which the tithe is taken. The situation of the roads in this case rather affords evidence against the Plaintiff. The Plaintiff is entitled to the ordinary occupation way used for the close in question; and the direct road is the way which the farmer says the Plaintiff ought to go.

Rule absolute for a new trial.

WIFFIN *v.* KINCARD.

June 15th.

In an action for assault, battery, and false imprisonment, if the verdict be for one shilling, and the Judge certify under 43 *Eliz. c.* 6. the Plaintiff will be deprived of his costs, though a battery was proved at the trial.

THIS was an action for assault, battery, and false imprisonment.

At the trial before Sir *J. Mansfield* Ch. J. at the Sittings after last *Easter* term, it appeared that a number of persons being assembled in consequence of an alarm occasioned by a mad ox, the Defendant, who was a constable, was sent for; that the Plaintiff had posted himself upon some rails before a gentleman's house, which place he refused to quit, though frequently desired; that the Defendant, in order to draw his attention, touched him with his constable's staff, but without hurting him, and desired him to get down; and the Plaintiff still refusing, the Defendant, at the desire of several persons, took him by the collar and carried him to the watch-house, from which he was discharged as soon as he could be brought before a justice. The jury found a verdict for one shilling damages, and the Chief Justice certified under the 43 *Eliz. c.* 6. that the damages amounted to one shilling only.

Best Serjt. now moved for a rule to shew cause why the prothonotary should not be directed to tax full costs to the Plaintiff, notwithstanding the certificate, and contended,

1807.

WIFFIN v. KINCARD.

tended, that as actions for assault and battery were excepted out of the statute of *Elizabeth*, it was not competent to the Judge to certify under that statute if any battery were proved; that in the present case a battery was proved, first by the striking with the constable's staff, for that the intention with which a blow is given makes no difference in a civil action for the battery, and, secondly, by taking the Plaintiff by the collar in order to carry him to prison: he referred to the case of *Emmet* v. *Lyne*, 1 *New Rep.* 255. where the whole question was, Whether a battery was proved or not? it being taken for granted that if proved the Judge could not certify.

The Court were clearly of opinion that the touch given by the constable's staff, in order to engage the Plaintiff's attention, did not amount to a battery; but there was some doubt whether the taking by the collar did not, Sir *J. Mansfield* Ch. J. saying that taking the Plaintiff by the collar without any improper violence, though an imprisonment was no battery, which is a beating; and *Chambre* J. saying that imposition of hands in order to imprison is a battery.

The Court agreed, however, that whether the evidence amounted to proof of a battery or not it would not prevent the Judge from certifying with respect to the imprisonment under the 43 of *Elizabeth*; that the Plaintiff was not entitled to full costs for the assault and battery, unless the Judge certified under 22 & 23 *Car.* 2. *c.* 9. and here no such certificate had been granted. And with respect to the imprisonment to which the 43 *Eliz.* applied, a certificate had been granted under that statute by which the Plaintiff was deprived of his costs.

Best Serjt. took nothing by his motion.

1807.

B. SMITH *v.* G. SMITH.

June 16th.

If Defendant pay a sum of money into Court and obtain an order to stay proceedings on payment of that sum and costs, and omit to pay the costs when taxed, the Plaintiff, after taking the money out of court, may proceed without a previous demand of the costs.

THE Defendant in this case paid 13*l.* 4*s.* into court, and obtained an order for staying proceedings upon payment of that sum and the costs. The Plaintiff took the 13*l.* 4*s.* out of court, and taxed the costs; but the defendant having omitted to pay them, he proceeded to trial, and obtained a verdict for nominal damages.

Best Serjt. obtained a rule to shew cause why these proceedings should not be set aside, on the ground that the Plaintiff ought to have served the Defendant with the prothonotary's *allocatur*, and demanded the costs before he proceeded; and contended that this mode of recovering the costs was analogous to a proceeding by attachment, where the *allocatur* must be served and the sum demanded.

Shepherd Serjt. shewed cause, and insisted that the costs not being paid pursuant to the order, the Plaintiff was entitled to proceed without a demand.

The Court thought that the order was conditional that the proceedings should be staid if the costs were paid, but not otherwise: and the condition not having been complied with, the Plaintiff was entitled to proceed.

Rule discharged, with Costs.

1807.

June 16th.

AYREY *v.* DAVENPORT.

The Judgment book is not evidence of the judgment entered therein, though the record has not been made up, and though the person interested in proving the judgment be no party to the action.

Semb. That the person so interested may compel the party to enter up his judgment,

Semb. That if the holder of a joint and several promissory note enter up judgment by *cognovit* against one of the makers, and levy part under a *fi. fa.*, this is no discharge of the other.

THIS was an action upon a joint and several promissory note given by the Defendant and one *Jeremiah Barber.*

At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* Sittings in this term, the defence set up was, that the Plaintiff, under a warrant of attorney given by *Barber*, had entered up judgment against him, and levied part under a *fi. fa.* To prove the judgment the Defendant offered in evidence the judgment-book, which was produced by the officer of the court: but no notice having been given to the Plaintiff to produce the judgment-paper, the Chief Justice rejected the evidence, and a verdict was found for the Plaintiff.

A rule *nisi* for a new trial having been granted on a former day,

Clayton Serjt. now argued in support of that rule. It was unnecessary to give any notice to produce the judgment-paper, it being equally competent to the Defendant to give in evidence the judgment book or judgment-paper, if either of them were admissible, the former being the original authentic entry of the judgment, and the other an act of court granted upon it, in the same manner as the original book containing the acts of the ecclesiastical court, or a probate may be given in evidence. The judgment-paper is marked by the prothonotary, to shew that it has been entered in the book. In this case it was not in the power of the Defendant to produce the record of any judgment, for the roll was not carried in, and the Defendant not having been a party to the action against him, could not have compelled the Plaintiff to complete his judgment. In *Waters* v. *Ogden*, *Doug.* 452. the Defendant's

Defendant's administrators pleaded a confession of assets in another action, where no judgment had been entered up; it was admitted that the plea was new, but it was supported on the ground of necessity; but if the Defendant could have compelled the Plaintiff in such action to enter the judgment it would not have been necessary to rely upon the plea. With respect to the effect of the judgment, the case of *Basset* v. *Lane and Wood*, *Lit. Rep.* 17. it was held that the acceptance of a statute from *Lane* extinguished a joint and several debt against *Lane* and *Wood*, the contract being merged in the higher security: the circumstance of the action being brought against *Wood* alone shews that it must have been a joint and several debt. The cases of *Dean* v. *Newhall*, 8 *Term Rep.* 168. and *Drake* v. *Mitchell*, 3 *East*, 251. expressly proceeded upon grounds which distinguished them from *Basset* v. *Lane and Wood*, and consequently do not impeach that case. In *Hooper*'s case, 2 *Leon.* 110. it was even said to have been adjudged, in *Pudsey*'s case, that where one was indebted in simple contract, and another gave a bond for the same sum, the contract was determined. And in *Fryer* v. *Gildridge*, *Hob.* 10. an implied release in law arising from the circumstance of the wife of one obligor in a joint and several bond having been made executrix, was holden to extend to the other.

Sir JAMES MANSFIELD Ch. J. In this case there is no evidence of the judgment. The judgment-paper is most like evidence, but notice has not been given to produce that. I have no conception, however, but that any person who is interested in a judgment may compel the Plaintiff to enter it up. The case of *Waters* v. *Ogden* has no application to this. It only decides that an administrator by confession of assets being liable to have judgment signed, has bound himself, and may plead that obligation. I do not think, however, that better evidence

1807.

AYREY v. DAVENPORT.

evidence of the judgment could assist the Defendant. What is said of *Pudsey*'s case cannot be law. If an action be brought against *Barber*, and he suffer judgment by default or confession, how can that discharge an action against the Defendant? the Plaintiff has a right to sue every one of the makers of this note to judgment; though it is true that he cannot have satisfaction more than once. And whether the judgment against *Barber* were obtained by *cognovit* or in any other way can make no difference.

The other Judges concurring,

Rule discharged.

June 16th.

WOODWARD *v.* WALTON.

An action for debauching the Plaintiff's daughter *per quod servitium amisit*, is an action of trespass, and a count for that purpose may be joined with a count for breaking and entering the house.

TRESPASS. The first count of the declaration stated that the Defendant, with force and arms, broke and entered the dwellinghouse of the Plaintiff, and then and there assaulted, debauched, and carnally knew the Plaintiff's daughter, and got her with child, whereby the Plaintiff lost her service. The second count omitted the breaking and entering the dwellinghouse, but stated that the Plaintiff, with force and arms, assaulted, debauched, &c. the Plaintiff's daughter, &c. *per quod servitium amisit.*

At the trial before Sir *James Mansfield*, Ch. J. at the last *Bedford* assizes, a verdict having been found for the Plaintiff; a rule was obtained calling on the Plaintiff to shew cause why judgment should not be arrested on the ground of a misjoinder of action, it being contended that the second count was the subject of an action on the case.

Sellon,

1807.

WOODWARD v. WALTON.

Sellon, Serjt. shewed cause. The subject-matter of both the counts of this declaration is trespass; and the Plaintiff could not have sued upon either of them in any other form of action. It is said indeed by *Buller* J. in *Bennet* v. *Alcott*, 2 *T. R.* 167. that "an action merely for debauching a man's daughter, by which he loses her service is an action on the case. But according to *Holt*'s opinion, where the offence is accompanied with an illegal entry of the father's house, he has his election either to bring trespass for breaking and entering, and lay the debauching of the daughter and loss of her service as consequential; or he may bring the action on the case merely for debauching his daughter *per quod servitium amisit.*" The case however of *Russel* v. *Corne*, 2 *Ld. Raym.* 1032. in which the opinion of Lord *Holt*, alluded to by Mr. *J Buller*, is to be found, does not warrant his proposition. Lord *Holt* says, "a man cannot maintain an action against another for assaulting his daughter, and getting her with child; but he may maintain an action against another for entering his house and assaulting and getting his daughter with child *per quod servitium amisit*, and that is a great aggravation;" but he does not say that if he omit to allege an entry of the house he may maintain an action on the case. The only object of Lord *Holt*'s position is to shew, that trespass will lie for some things jointly with others, when it would not lie without them. He states, therefore, that an allegation either of breaking and entering, or *per quod servitium amisit*, is necessary. "As a man may have an action of trespass for entering his house and beating his servant, without saying *per quod servitium amisit*, because the beating the servant is part of the same trespass, and only a description of it by way of aggravation; but if he lay it (that is the beating the servant) in another count at another day, it will be ill, without saying *per quod servitium amisit.*" This plainly shews his opinion, that a count for

1807.

WOODWARD v. WALTON.

for the beating only *per quod servitium amisit*, might be joined with a count in trespass for breaking and entering. So in *Davis* v. *Stannion*, 2 *Ld. Raym.* 1042. *Powell* J. speaks of the action by the master for beating his servant *per quod servitium amisit*, as an action of trespass; and in *Courtney* v. *Collet*, 1 *Ld. Raym.* 274. Lord *Holt* expressly says, "If *A.* bring an action against *B.* for battery of *A.*'s servant *per quod servitium amisit*, it is a plain action of trespass." In the case of *Cook* v. *Sayer*, 2 *Burr.* 753. (*a*) the action is called an action on the case for criminal conversation, and a plea of not guilty within six years was allowed on demurrer. But it appears from 2 *Black.* 855. that it was a mistake of the reporter to call it an action on the case; for that the roll was searched, and it appeared to be an action of trespass and assault. In the case of *Batchelor* v. *Biggs*, 2 *Bl.* 854. where the question was whether the Plaintiff was entitled to costs in an action for *crim. con.* the verdict being under 40*s.* the Court expressly said that it was an action of trespass, though in the nature of an action on the case, which they supposed had occasioned the above mistake; and the ground of their decision against the Defendant was, that it was an action of assault and battery, and that no actions by trespass *quare clausum fregit*, and for assault and battery, were within the stat. 22 and 23 *Car.* 2. *c.* 9. respecting costs, according to *Browne* v. *Gibbons*, 1 *Salk.* 206.

Williams Serjt. in support of the rule. If the matter of the second count be the proper subject of an action on the case, the mere circumstance of its being usual to lay it *vi et armis*, will not make it trespass: for it is not uncommon to state in actions upon the case, that the injury was done *vi et armis*. Whether the injury be the

(*a*) 2 *Wils.* 85. S. C.

subject

1807.

WOODWARD v. WALTON.

subject of trespass or case, depends upon the question whether it arise immediately or consequentially from the act of the Defendant, as was laid down in *Reynolds* v. *Clarke*, 1 *Str.* 634. here the foundation of the action is the loss of service, without an allegation of which the action could not be maintained; and the loss of service must be proved or the plaintiff must fail. *Postlethwaite* v. *Parkes*, 3 *Burr.* 1878. Can it then be denied, that the loss of service is a consequential injury? In *Robert Mary*'s case, 9 *Co.* 113. it is said, "If my servant be beaten, the master shall not have an action of battery, if the battery be not so great that by reason thereof he loseth the service of his servant; but the servant himself for every little battery shall have an action; and the cause of the difference is, that the master hath not any damage by the personal beating of his servant, but by reason of a *per quod*, *viz. per quod servitium amisit*; so that the original act is not the cause of his action, but the consequent upon it." The meaning of Lord *Holt* in the case of *Russel* v. *Corne*, certainly must have been, that where the substance of the action is breaking and entering the house, trespass will lie, and the getting the daughter with child *per quod*, &c. is only aggravation. But if the action be brought for debauching the Plaintiff's daughter, it must be laid with a *per quod*, &c. But there must be some inaccuracy in supposing him to have said that these two causes of action might be stated in two counts in one action of trespass; for there are hardly any instances of two counts in one declaration in all Lord *Raymond*'s *Entries*. In this light the matter was understood by *Buller* J. in *Bennet* v. *Alcott*, who says that an action merely for debauching the Plaintiff's daughter is an action on the case; but if it be coupled with an illegal entry of the house, the Plaintiff has his election to bring either trespass or case. The case of *Cook* v. *Sayer* decided that not guilty within six years was the proper plea to an action for debauching

1807.

WOODWARD v. WALTON.

ing the Plaintiff's daughter. In *Macfadzen* v. *Olivant*, 6 *East*, 387. Lord *Ellenborough* said that whatever his opinion might have been if the point had then first arisen, yet the action having been considered in *Cooke* v. *Sayer* as an action on the case, he should be inclined so to consider it: and *Lawrence* J. referred to a case of *Parker* v. *Ironfield K. B. Hil.* 19 *G.* 3. in which Mr. J. *Buller* had written upon his paper-book, "This is an action on the case, and not of trespass, and therefore divers days, &c. proper;" and had indorsed "Declaration for debauching daughter, that Defendant on divers times, &c. assaulted, &c. good; for this is an action on the case: *aliter* in trespass for assault." The observation of the Court in *Batchelor* v. *Biggs*, that it was an action of trespass in the nature of case, is not very intelligible; for what is such an action, but an action of trespass on the case? It is classed under the head of actions on the case in 1 *Tidd's Pract.* 6. and the reasons for so classing it are there assigned; first, because the injury is consequential; secondly, because the Plaintiff may declare by bill with a *quod cum;* thirdly, because the plea is not guilty within six years; and, lastly, because the Plaintiff is entitled to full costs where he recovers less than 40*s*. If then the matter of the second count be the proper subject of an action on the case, the judgment must be *quod sit in misericordiâ*, though laid *vi et armis*, whereas the judgment in the first count must be *quod capiatur*. *Courtney* v. *Collet*, 1 *Ld. Raym.* 273.

CHAMBRE J. The case of *Guy* v. *Livesey*, *Cro. Jac.* 501. appears to me directly in point against the Defendant. That was trespass, for that the Defendant assaulted, beat, and wounded the Plaintiff, *nec non* that he assaulted and beat the Plaintiff's wife *per quod consortium uxoris suæ* for three days *amisit*. On motion in arrest of judgment, because these matters could not be joined, since the wife ought

ought to have been made co-plaintiff in respect of the injury to her, the Court held that the action was well brought; for it was not brought in respect of the harm done to the feme, but for the particular loss of the husband of the company of his wife, for which he might have an action, as the master should have for the loss of his servant's service. In truth, this action never was considered as an action on the case till the doubt was raised by Mr. Justice *Buller*. The cases cited from Lord *Raymond* negative his recollections of Lord *Holt*'s opinion; and all that has since passed upon the subject is referable to the mistake into which Mr. Justice *Buller* fell upon that subject. There is no ancient authority to justify his opinion: and if this matter was now for the first time to be determined, it could not be considered as an action on the case. It is true, that the boundaries of actions ought to be preserved. But other actions of an analogous nature have always been held to be trespass. They are of a peculiar species, as much established as any thing can be. A man may have trespass for taking away his heir where he is entitled to ward. So if an abbot or other person be entitled to toll, and send his servant to take it, and another disturb his servant, he shall have a general action of trespass. *F. N. B.* 90, 91. (*a*). This doctrine has been acted upon; and the practice has prevailed accordingly in all times. I do not find however that the point has ever been brought directly in question, except in the case in *Cro. Jac.* But there it was clearly decided. I have looked much into the authorities; and was greatly surprized to find the doubt suggested by Mr. Justice *Buller*.

Cur. adv. vult.

(*a*) See *Rastall's Entr.* p. 555. *Trespass, Assault and Battery, pl.* 20. and p. 605. *Trespass, Servant, pl.* 1. which were trespass for beating Plaintiff's servant *per quod*, &c. Also p. 555. *b. Trespass, Assault and Battery, pl.* 23. which was trespass for beating the Plaintiff's horse *per quod equus ille ulterius deservire non potuit.*

1807.

WOODWARD v. WALTON.

The opinion of the Court was this day delivered by Sir JAMES MANSFIELD, Ch. J. A little confusion has arisen in some of the cases from the insertion of the words *vi et armis* in actions on the case, those words being generally applicable to actions of trespass only; and I certainly do not recollect to have seen them used in actions upon the case. In actions like the present, as far as my recollection goes, the form of the declaration has always been in trespass *vi et armis* and *contra pacem*. I cannot distinguish between this action and an action for criminal conversation. If that be the subject of trespass, this must be so too. In the action for criminal conversation, the violence is not the ground of the action: both in that case and in this, if the injury were committed with violence it would amount to a rape. I do not see therefore any good reason why either of them should be the subject of an action of trespass. But it seems from the cases which we have looked into that the action for criminal conversation has been considered for years as the subject of an action of trespass. In actions by a master for an assault upon his servant *per quod servitium amisit* there is no trespass against the Plaintiff; the sole foundation of the action is the loss of service: yet this also has been considered as an action of trespass. All these cases are the same in principle, and fall within the same rule. The case of *Guy* v. *Livesey*, *Cro. Jac.* 501. is not distinguishable from this case. There the Plaintiff declared in trespass first for an assault upon himself, and secondly for an assault upon his wife *per quod consortium uxoris suæ* for three days *amisit*: a verdict having been found for the Plaintiff on both, a motion was made to arrest the judgment, because the Plaintiff had joined the battery of his wife with the battery done to himself; but the Court held the action well brought, saying it was not brought for the harm done to the wife, but for the particular loss of the husband. In the case

of

1807.

WOODWARD v. WALTON.

of *Tullidge* v. *Wade*, 3 *Wils.* 18., which was an action of trespass for debauching the Plaintiff's daughter, a motion was made to set aside the verdict on account of the damages being excessive, and there is no doubt that every objection would have been made to the form of the declaration which could avail the Defendant, yet no objection was there made to the form of the action being trespass, and not case. In another case, *Stra.* 192. 1 *Salk.* 208. 3 *Keb.* 184., where there was a dispute about costs, it is said that if a man bring trespass for beating his servant, this is not an action of assault and battery, but an action founded on the special damage; yet the action is spoken of as an action of trespass; and in the notes to *Fitz. Nat. Brev.*, where an action of assault on the Plaintiff's servant *per quod servitium amisit* is spoken of, it is treated as an action of trespass. The two modern cases which have been alluded to entirely originated in the opinion thrown out by Mr. Justice *Buller*; 2 *Term. Rep.* 167.; and which seems to have been founded upon a mistake respecting two other cases, one in *Burrow* and the other in Lord *Raymond*. Upon looking into the case of *Postlethwaite* v. *Parkes*, 3 *Burr.* 1878. it appears to have been an action of trespass; and the case of *Russell* v. *Corne*, *Ld. Raym.* 1031. is certainly rather in favour of trespass than against it. There are many more cases which we have looked into; and upon these cases as well as upon the fixed opinion which I have always entertained, and which is founded upon my former practice at *nisi prius*, I am quite satisfied that the injury now complained of is the subject of an action of trespass. I never saw a case in which I should more willingly have arrested the judgment than in this, if I could have done so consistently with law. If I had been upon the jury, I should have found a verdict for the Defendant.

1807.

WOODWARD v. WALTON.

CHAMBRE J. added, there is another case in Lord *Raymond*, 274., *Courtnay* v. *Collett*, where the opinion of Lord *Holt* upon this subject is distinctly stated. It is there said, "Note that *Holt* C. J. said in this case, that if *A.* bring an action against *B.* for battery of *A.*'s servant, *per quod servitium amisit*, it is a plain action of trespass;" so that Mr. J. *Buller* must have been mistaken with respect to Lord *Holt*'s opinion.

Judgment for the Plaintiff.

June 10th.

If a ship warranted neutral be condemned as prize by a *French* Court of Admiralty, and a Court of Appeal afterwards reverse such sentence, but refuse to give damages or costs, on account of the muster roll not expressing the place of nativity of the crew according to an ordinance of *France*, and it be proved that the ship was otherwise properly documented as a neutral, the assured may recover for the detention, notwithstanding such refusal of the Court of Appeal to allow damages or costs.

SIFFKEN v. LEE.

THIS was an action on a policy of insurance on the *Minerva*, warranted a *Dantzic* vessel, "from *Dantzic* to *Dublin*." The loss alleged and proved was, capture by a *French* privateer, in consequence of which, though ultimately restored, greater expences were incurred by legal proceedings and otherwise during her detention than the ship afterwards produced upon a sale ordered by the Court of Admiralty at *Dublin*, in order to satisfy the holder of a bottomry bond upon her. At the trial before Sir *James Mansfield* C. J. at the adjourned sittings after last *Easter* term, the defence chiefly relied on was a breach of the warranty that the *Minerva* was a *Dantzic* ship. Upon this point the sentences of two subordinate prize tribunals of *France* which had condemned the *Minerva*, and the sentence of the *Tribunal de Cassation* at *Paris*, which had reversed the two former sentences and restored the *Minerva*, were read, it being insisted for the Defendant, that though it was proved that the *Minerva* had all the papers ever carried by a *Dantzic* ship, still that from the latter sentence it appeared that at the time of the capture the *Minerva* had not on board all those papers which were necessary to protect her from the *French*, and

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which a *Dantzic* ship ought to have had under the above warranty. The material parts of the sentence of the *Tribunal de Cassation*, after premising, 1st, that the validity of the capture hinged upon the single fact of neutrality; 2dly and 3dly, that the neutral quality of the cargo was proved, and not subject of prize, were as follow: "4thly, Considering that the neutral quality of "the ship *Minerva* is proved first by the bill-brief, fur- "ther by the sea-brief or passport of the 8th *May* 1799; "which, although it has been made use of for another "voyage preceding that in the prosecution whereof the "capture has been made, shews nevertheless that at that "time a *Prussian* of the name of *Golbech* was the owner "of the said vessel; and also by the certificate of the "*Prussian* consul at *Elsineur* of the 15th *October* 1799; "all which documents have been found on board the "aforesaid ship; and, lastly, in a more than sufficient "manner, by the certificates exhibited by the *Prussian* "agent; 5thly, That although the passport or sea-brief "of the 8th *May* 1799 *could not pursuant to the disposition* "*of the ordinance of* 1778 *authorize the navigation of the* "*ship* Minerva *at the moment of the capture*, because it is "acknowledged that the said passport had been made "use of on a former voyage; yet the permission to na- "vigate is implicitly contained in the muster-roll; and "that among the ship's papers there exists moreover "another document in form of a passport, bearing date "the 4th *October* 1799, which has very improperly been "considered as a mere manifest of the cargo, since be- "sides the enumeration of the goods captured, and "stated to belong to *Christopher Schmidt*, a burgher of "*Dantzic*, it points out the destination, is signed and "sealed by the same public board which expedites or "grants passports at *Dantzic*, and terminates as follows, "*viz.* We consequently request all constituted autho- "rities to whom this present certificate may be pro-

"duced,

1807.

SIFFKEN v. LEE.

" duced, or to whose office it may belong to certify the " same, to permit the neutral ship *Minerva* to pass un- " molested with her said cargo, the whole being neutral " property, and not belonging to any foreigner or sub- " ject of a state which is at present at war, and not in " the least to obstruct her voyage; which favour we " promise to return on every occasion when similar cer- " tificates shall be produced to us;" 6thly, " That " with regard to the ship's articles, containing a list of " the crew of the captured ship, the want of the state- " ment of the native country of the persons who com- " pose the crew renders the said list in this respect re- " pugnant to the *French* regulations; yet that it appears " from the rest of the ship's papers that the master is " established and dwells in *Prussia*, and not the slightest " proof has been produced that the people or seamen " serving on board the aforesaid ship were either born " or reside in an enemy's country; all which people and " seamen have unanimously and without the least ambi- " guity declared, in the presence of the captors, that " they were born and reside either at *Dantzic* or in the " neighbourhood of that city; and that these declara- " tions, however insufficient they may appear, admit of " being corroborated by the certificates granted by the " magistrates of *Dantzic*, which from the relations of " amity and friendship subsisting between the *French* re- " public and *Prussia* ought not to be considered as the " result of surprize, or the work of undue compliance; " so that it appears to be a simple omission which has " taken place only in one of the ship's papers, and which " would be too rigorously punished by the confiscation of " the ship and cargo at a time when they are claimed " as *Prussian* property by the representative of a sove- " reign who has given so many proofs of his sincerity " and friendship, and has so heartily joined in the sacred " cause of the liberties of the seas; 7thly, That how-

" ever,

" ever, this omission, which considered in itself is ex-
" tremely important, does not admit of any damages or
" costs being adjudged to the claimants;"—the sentence then proceeded to decree the capture of the *Minerva* " unlawful and null," and to reject the claim preferred by the captain respecting any damages, costs, and indemnities whatsoever.

The jury found a verdict for the Plaintiff.

A rule *nisi* for a new trial having been obtained on a former day,

Best and *Marshall* Serjts. were this day called upon by the Court to support the rule. They contended, that foreign prize courts have the same right to decide upon the regularity of a ship's papers, and mould their judgment according to the conclusions they come to upon that fact, as they have to decide upon the neutrality of the ship itself; and that it appeared from the last sentence, that though by procuring fresh papers from *Dantzic* the court of appeal was satisfied, still at the time of the capture the *Minerva* had not on board all her papers regular; and that in consequence the court of appeal had refused to give costs and damages upon the reversal of the former sentences. They also argued, that under a warranty of neutrality the assured was bound to furnish himself with all such papers as secured his ship against the attacks of any belligerent power, even though the necessity of having such papers should be founded on partial ordinances; and for this they cited *Barzillay* v. *Lewis*, *Park*. 358., where Lord *Mansfield*, on a warranty of " *Dutch* property," said, " the warranty meant that the ship was *Dutch, to the purpose of being protected.*" And again in the same case, " in every war the belligerent powers make particular regulations for themselves, which being no part of, or perhaps repugnant to the law of nations, do not bind other states; but other states, though not

1807.

SIFFKEN v. LEE.

not bound by them, must take notice of them for their own safety. In this case the insured warranted the ship to be *Dutch*, and they knew they must conform to the marine regulations of *France*." They urged that the same principle was adopted by Sir *Wm. Grant* in his judgment on the case of *Kindersley* v. *Chace*.

Shepherd and *Lens* Serjts. *contrà*.

Sir JAMES MANSFIELD Ch. J. In this case the *Minerva* was proved to be a *Dantzic* ship, and she was also proved to have had on board at the time of the capture all the papers ever carried by *Dantzic* ships. However she was taken into a *French* port by a cruizer of that nation; and this action is brought to recover the loss sustained by the assured in consequence of that capture. The underwriters are clearly liable, unless they can shew that the capture arose from some default of the assured; but they contend they are not liable, because the sentence of restitution has refused damages and costs to the assured. The result of the sentence of the tribunal *de Cassation* is, that the *Minerva* was proved to be neutral; but because she was not documented according to the ordinances of *France*, though she was documented according to the laws of nations, therefore damages and costs were not allowed. The precise ground of the refusal to allow costs and damages is, that the muster-roll did not express the place of nativity of the crew, which was required by the *French* regulations. Then the first question will be, whether a ship warranted as this is, and sailing from the port of *Dantzic*, documented according to the law of nations, ought also to be documented according to all the private regulations of all the belligerent powers? In *Mayne* v. *Walter* (*Park* 362.) Lord *Mansfield* put all private regulations of belligerent powers out of the question, saying they could have no effect unless known. If therefore we were to stop here,

here, there would be an end of the present case, for it does not appear that the regulation referred to in the *French* sentence was known at *Dantzic*. But let us consider the general question. Prize or no prize ought to be decided by the law of nations, and that law must be collected from the writers upon the subject, and from the treaties existing between nations. In *Barzillay* v. *Lewis* non-compliance with the provisions of the treaty of *Utrecht*, by a ship warranted *Dutch*, was held to be fatal, because the provisions of that treaty were part of the law of nations between the *Dutch* and the *French*, by whom the capture was made. It has lately been under consideration whether the sentences of courts of admiralty ought to be impeached, though founded on very wicked reasons; and it is now decided, that the question of prize or no prize, though foolishly reasoned by the court of admiralty, is nevertheless concluded by their judgment. Be the premises upon which that judgment proceeds what they may, yet if it decides the ship to be lawful prize that question cannot again be agitated. No question has ever arisen as yet with respect to the refusal of a prize court to allow damages and costs, as discharging the underwriters from their liability; and indeed it would be very odd if such a refusal could discharge them. It is a matter of mere discretion in the Court. In this case the refusal to allow them is founded on two private ordinances of *France*, not shewn to be within the knowledge of the people of *Dantzic*, and therefore the refusal of the *French* court can afford no ground for holding the underwriters released from their engagement to pay. Indeed I see no reason for extending the doctrine of the conclusiveness of sentences of courts of admiralty.

HEATH J. I am of the same opinion. The conclusive effect of the sentence of condemnation is now settled; why then is not the same effect to be given to the sentence

of

1807.

SIFFKEN v. LEE.

of acquittal? As to the refusal of damages and costs, that is merely accessary to the main point in dispute, and a refusal only of a part of the prayer of the appellant, which if granted would not be part of the sentence on the question of prize.

ROOKE J. I am of the same opinion. The question of costs is quite distinct from the question of prize.

CHAMBRE J. If the *French* court had expressly decided that they refused damages and costs because the *Minerva* had not the proper papers on board for the voyage, we might perhaps have been bound by such a finding. But it appears from the sentence that they refused damages and costs, because the *Minerva* had not complied with *French* ordinances. The refusal therefore was a mere arbitrary act of the court.

Rule discharged

1807.

June 16th.

DOE, on the Demise of JOHN GODFREY LUSHINGTON, - - - - - - Plaintiff.

versus

RICHARD Lord Bishop of LANDAFF, Sir STEPHEN LUSHINGTON Bart., MARY LUSHINGTON, Widow, EDMUND HENRY LUSHINGTON, HENRY JOHN LUSHINGTON, STEPHEN RUMBOLD LUSHINGTON, JAMES LANE LUSHINGTON, and CHARLES MAY LUSHINGTON, Esquires, - - - - - Defendants.

A testator having devised his lands suffered a recovery thereof, in which, as well as in the deed to make a tenant to the *præcipe*, the tenant was called *Edward*, his real name being *Edmund*. In ejectment by the heir at law against the devisees, held that the recovery was good by estoppel against the testator and all persons claiming under him, and that the will therefore was revoked thereby. A rectory in *Kent*, formerly belonging to one of the dissolved monasteries, having been granted by *Henry* 8. to a layman to be holden in fee by knight's service *in capite*; held that the lands were descendible according to the custom of gavelkind, but the tithes according to the common law.

THIS was an ejectment brought in pursuance of a direction in a decree of the Court of Chancery in order to ascertain whether the devise in the will of the Rev. *James Stephen Lushington*, of the date of the 26th of *Dec.* 1794, of the manor of *Rodmersham*, alias *St. John's Hole*, with the appurtenances, and of the several lands, hereditaments, and premises, situate at *Rodmersham*, *Bapchild*, *Murston*, and *Tong*, and of the rectory appropriate of the parish church of *Rodmersham*, with the appurtenances, and the tithes, obventions, oblations, pensions, and portions to the said rectory belonging, had been revoked, and whether any and what part thereof were of gavelkind tenure, or descended according to the rule of the common law.

At the trial before the Lord Chief Baron at the last assizes for *Kent*, the jury found a verdict for the Plaintiff for one-sixth part of all the premises in question, except the rectory, and for the whole of the rectory, subject to the opinion of the Court on the following case.——The Rev. *James Stephen Lushington*, at the time of making

and

1807.

DOE dem. LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

and publishing his will and of his death, was seised in fee simple of the manor, land, premises, and rectory in question. By his will duly executed and attested, of the 26th *Dec.* 1794, the said Rev. *James Stephen Lushington* devised all his manors, messuages, land, tenements and hereditaments, situate in the several parishes of *Rodmersham*, *Bapchild*, *Milton*, *Swade*, *Murston*, *King's North*, *Mersham*, *Sevington*, and *Tong*, in the county of *Kent*, or elsewhere in the county of *Kent*, with the appurtenances, whereof or wherein he had any estate or interest in possession, reversion, remainder or expectancy which he had any power to dispose of (other than what was customary or held by copy of court-roll) unto his wife *Mary*, the Lord Bishop of *Landaff*, Sir *Stephen Lushington*, Bart., and *Edmund Henry Lushington*, their heirs, executors, administrators, and assigns, upon trust for sale, and to apply the produce unto and for the benefit of his younger children, *William John*, *Stephen Rumbold*, *Hester Paulina*, *Dorothy Christian*, *James Lane*, and *Charles May*, in equal proportions. *In Hilary* term 1801 a common recovery was suffered of all the premises in question, in which *George Ellis* appears to have been demandant, *Edward Henry Lushington* tenant, and the said *James Stephen Lushington* vouchee. On the 17th *June* 1801 the testator died, leaving the Plaintiff *Thomas Godfrey Lushington* his heir at law, and the said *Thomas Godfrey*, *Edmund Henry*, *William John*, *Stephen Rumbold*, *James Lane*, and *Charles May*, his heirs, according to the rule of gavelkind descent; all the lands and premises in question, except the rectory and tithes, are of gavelkind tenure. But it was contended on the part of the Plaintiff, that the rectory and tithes descended to him as heir to the testator according to the rule of the common law, and are not, as alleged by the Defendants, subject to the custom of gavelkind. On the part of the Defendants it was submitted, that the tenant to the *præcipe* in the recovery in *Hilary* term

1807.

DOE dem. LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

term 1801 was misdescribed, being called *Edward Henry Lushington*, and his real name being *Edmund Henry Lushington*, which vitiated the recovery, and that the devise in the will stood unrevoked. To shew the misnomer of the tenant to the *præcipe* they produced indentures of lease and release of the 11th and 12th *February* 1801, the lease expressed to be made between the said Rev. *James Stephen Lushington* of the one part, and *Edward Henry Lushington*, Esq. of the *Middle Temple*, *London*, of the other part, and the release being of three parts, expressed to be made between the said *James Stephen Lushington* of the first part, the said *Edward Henry Lushington* of the *Middle Temple*, Esq. of the second part, and *George Ellis*, Gent. of the third part, whereby the said manor of *Rodmersham* and other the premises comprised in this ejectment (being part of the hereditaments and premises devised as hereinbefore mentioned by the will of the said *James Stephen Lushington*) were by him the said *James Stephen Lushington* granted, bargained, sold, released, and confirmed to the said *Edward Henry Lushington*, (or mentioned so to be,) to hold unto the said *Edward Henry Lushington* and his heirs, to the use of the said *Edward Henry Lushington* and his heirs, to the intent that the said *Edward Henry Lushington* might become a good and perfect tenant, so that one or more good and perfect common recovery or recoveries, with double voucher, might be had and executed; wherein the said *George Ellis* was to be demandant, the said *Edward Henry Lushington* tenant, and the said *James Stephen Lushington* vouchee; and which said recovery or recoveries it was thereby declared should enure to certain uses therein expressed. They then proved that *Edmund Henry Lushington*, mentioned by the testator in the said devise, one of the sons of the testator, a Defendant in this cause, and then present in court, was the person named in the abovementioned deeds and recovery *Edward Henry*, and

that

1807.

Doe dem. Lushington v. The Lord Bishop of Landaff and Others.

that he was the person who appeared at the bar of the Court of Common Pleas as tenant; that he was of the *Middle Temple*, as described in the indentures of lease and release, and that there was no person of the name of *Edward Henry Lushington* a member of that society. That the said *Edmund Henry* executed the said deeds by signing *E. H. Lushington* only; that he was baptized by the name of *Edmund*; that in the entries of his admission at *Queen's College, Cambridge*, and the *Inner Temple*, he was named *Edmund*; and that he was never known, nor did he ever pass by the name of *Edward Henry Lushington*.

In support of the claim of *Thomas Godfrey Lushington* to the whole of the rectory, it was proved that the said rectory and church of *Rodmersham*, and all lands, tenements, glebe, tithes, oblations, and other rights, commodities, emoluments, and appurtenances whatsoever thereunto belonging in the said county of *Kent*, were parcel of the late preceptory or commendatory of *West Peckham* in the same county of *Kent*, and belonged to the priory or hospital of *St John of Jerusalem* in *England*; and that upon the dissolution of that hospital they were given and granted by King *Henry* the eighth to *John Pordage* his heirs and assigns for ever, as fully, freely, and entirely, and in as ample manner and form as the late prior of the said late hospital of *St. John of Jerusalem* in *England*, or any one or more of his predecessors in the right of that priory at any time before the dissolution of the same, or before that priory came to the Crown, held and enjoyed the same rectory and tithes; to hold of his said majesty, his heirs and successors *in capite*, by the service of the twentieth part of a knight's fee.

The questions for the opinion of the Court were, whether the evidence of the misnomer of the tenant to the præcipe was rightly admitted; and if rightly admitted, whether such misnomer prevented the recovery of *Hilary* term 1801 from revoking the devise of the premises comprised

prised in the said recovery: and whether the rectory and tithes of *Rodmersham* were subject to the custom of gavelkind, or descended according to the rule of the common law.

If the Court should be of opinion that such evidence ought not to have been received, or being received that it did not prevent the recovery from operating as a revocation of the devise of the premises, the verdict to stand for the lessors of the Plaintiff for the entire rectory, provided the Court should think that it was not subject to the custom of gavelkind; and if the Court should be of opinion that the rectory was subject to the custom of gavelkind, then for only 1-6th of the rectory: and as to the rest of the premises in the declaration, the verdict to be for him for 1-6th part of such premises. If the Court should be of opinion that such evidence ought to have been received, and that it did shew that the recovery did not operate as a revocation of the will, then a nonsuit to be entered.

This case was twice argued, first in *Trinity* term 1806, by *Best* Serjt. for the lessor of the Plaintiff, and *Bayley* Serjt. for the Defendants; and again in *Trinity* term 1807, by *Williams* Serjt. for the former, and *Shepherd* Serjt. for the latter.

Arguments for the lessor of the Plaintiff. The first question is, whether the misnomer of *Edmund Henry Lushington* in the conveyance to the tenant to the *præcipe*, and in the recovery, will affect the validity of the recovery; the second, whether supposing the recovery to be invalid, it will operate as a revocation of the will; and the third, whether the rectory be descendible according to the custom of gavelkind. 1st, In this case all the parties to the recovery are estopped from saying that the name is *Edmund;* for the judgment in a common recovery is of equal force with a judgment in an adversary suit. *Pigott on Recov.* 123. *Cruise on Recov.* sect. 248.

Bull

1807.

Doe dem. Lushington v. The Lord Bishop of Landaff and Others.

Bull v. *Wyatt*, *Cro. Car.* 388. And it was holden by *Scrope* J. that where a fine was levied to *R.* and *S.* his wife, (her real name being *J.*) remainder to the right heir of *R.*; that the son of *R.* by a former wife was estopped in an assize brought against *J.* from saying that her name was *J.* when his father was joined in the fine levied to her by the name of *S.* *Bro. Abr.* tit. *Estoppel*, 113. *Feoffment de Terres*, 20. *Fines Levy de Terre*, 117. Fine and recovery are mentioned as matters of estoppel, *Co. Lit.* 352. *a.* So in the case of *Henriques and others* v. *The Dutch West-India Company, in Error*, 2 *Ld. Raym.* 1535. which was a *scire facias* upon a recognizance of bail, it was holden that the Defendant was estopped by his recognizance from saying that the Plaintiffs were not a corporation. In 2 *Leon.* 11. *pl.* 17. where a lease was made by indenture to begin after the expiration of a lease to *D.*, the lessor in an action of covenant by the second lessee said, that there was no such person *in rerum natura* as *D.*; but he was holden to be estopped. To the same effect is *Plowd.* 421. 434. With respect to records, though a party may be admitted to aver matters which are consistent therewith, he shall not be allowed to allege any directly contrary to them. *Hynde*'s case, 4 *Co.* 71. *b.* Therefore if a man levy a fine of my lands, I am bound. 1 *Rol. Abr.* 863. *Estoppel*, *pl.* 2. Or if a man be vouched, and a stranger appear and acknowledge the action, this shall bind, *pl.* 4. All parties and privies in blood and in law are bound by an estoppel. *Co. Lit.* 352. *a. b.* And in *Trevivan* v. *Lawrence*, 1 *Salk.* 276. the Court held that an estoppel binds not only parties, but all who claim under them; and that they run with the land. But admitting that the Defendants are at liberty to shew that the name is *Edmund* and not *Edward*, yet the variance will not affect the recovery. There is no confusion or ambiguity patent upon the face of the deed or recovery. The ambiguity is latent, and must be raised by evidence;

in

1807.

DOE dem. LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

in which case it may also be explained by evidence. *Ambiguitas verborum latens verificatione facti suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur.* *Bacon's Maxims*, 25. In the present case the evidence clearly shews that the person described can apply to no one but the tenant in the recovery. *Constat de personâ.* In Dr. *Ayray's* case, 11 *Co.* 20. *b.* 21. *a.* it is said, that if a person be so described that he may be certainly known from other persons, the omission, or in some cases the mistaking of the name of baptism, shall not avoid the grant; as in case of a grant by *Richerus*, abbot of *W.*, where his name was *Richardus;* of a grant *Margaretæ uxori suæ*, where the name was *Margery;* and *Mariott uxori suæ*, where the name was *Marion.* And it is said, 2 *Bacon's Abr.* 651. that if there be sufficient shewn to ascertain the grantor and grantee, and to distinguish them from all others, the grant will be good. 2dly, Supposing the recovery to be invalid, yet it operated as a revocation of the will of *James Stephen Lushington* the vouchee: for however inoperative it may have been in barring the issue in tail or the remainders, yet it was good against the person who suffered it. Thus in Lord *Say* and *Seale*'s case, 10 *Mod.* 45. it is said, common recoveries, although there are no tenants to the *præcipes*, are good by way of estoppels against the parties who suffer them, though not against remainder-men, strangers, *&c.* To this effect also is *Buckler*'s case, 2 *Co.* 55. *Webb* v. *Hill*, *Cro. Eliz.* 21. And this is admitted in *Pigott on Recov.* 32. And though imperfect, the recovery sufficiently manifested an intent to dispose of the estate devised, and therefore revoked the will. Thus if *A.* having made one will devise to a parish or corporation by a second will, the latter, though void, revokes the first, 1 *Rol. Abr.* 614. *Devise, Revocation*, O. *pl.* 4. So a feoffment without livery, a grant of a reversion without attornment, and a bargain and sale without enrolment. 1 *Rol. Abr.* 615.

1807.

Doe dem. Lushington v. The Lord Bishop of Landaff and Others.

Devise, Revocation, P. *pl.* 4, 5, 6. In none of these cases does the estate devised pass out of the testator, and yet they have been deemed revocations, on the ground of the intent manifested by the testator. This principle is fully considered in the cases, *Beard* v. *Beard*, 3 *Atk.* 72. *Sparrow* v. *Hardcastle*, 3 *Atk.* 803. *Brydges* v. *Duke of Chandos*, 2 *Ves.* jun. 417. 3dly, The rectory, though situated in *Kent*, is descendible according to the rules of the common law. In *Robinson on Gavelkind*, p. 86. it is said that "parsonages, tithes, &c. that came to the Crown by the statutes for the dissolution of monasteries, &c. are made by those statutes and that of 32 *H.* 8. *c.* 7. in the hands of laymen temporal inheritances, and husbands may be tenants of them by the curtesy, and wives endowed of them." *Co. Litt.* 159. "Upon which may possibly arise a question of some importance, whether tithes impropriate issuing out of gavelkind lands shall descend to the eldest son, or go according to the custom of the lands out of which they arise. And the like doubt may be made concerning dower and tenancy by the curtesy. But it will be very difficult to maintain that these new inheritances can be directed or controuled by the custom, since they are within time of memory duties merely ecclesiastical, collateral to the estate of the land, and are no part of the old lay fee." Then after saying, "that he could find no case in the books in point to this question (possibly because never accounted a difficulty) save one," the author refers to a case in *Hughes' Abr. Mich.* 10 *Jac.* 1. where it was determined that tithes arising out of a manor which was borough English should go to the eldest son; "because tithes do not come naturally of the land, but by manual occupation; and also of common right tithes are not an inheritance descendible, and by the statute of monasteries it is only that they are descendible to heirs." It is clear that the rectory in question, during all the time that it continued in the hands

of

1807.

Doe dem. Lushington v. The Lord Bishop of Landaff and Others.

of the hospital of *St. John*, as well as in the hands of the king, was not descendible according to the custom, and partible among all the sons. And as soon as it was granted by the Crown, it was granted upon a tenure, namely knight service, to which the customs of gavelkind do not apply, that custom being "confined to tenements of soccage tenure," as appears from *Robinson*, p. 87.

Arguments for the Defendants. 1st, The deed to make a tenant to the *præcipe* is void on account of the misnomer. It is true, that where a grant is made to a person by his name of office, or dignity, or to a woman as the wife of *J. S.*, and the Christian name is but an adjunct, a mistake in the Christian name will not vitiate the deed. *Co. Lit.* 3. But in other cases it will. Thus in the Comment upon *Bacon*'s 24th Maxim: "If I grant lands to *J. S. filio et hæredi G. S.*, and it be true that he is the son and heir of *G. S.*, yet if his name be *Thomas* it is a void grant." It is indeed said in *Shepherd's Touchstone*, 236. that a grant to *Alfred Fitzjames* by the name of *Ethelred Fitzjames* is good; and *Bro. Abr. Confirmation*, 30. is referred to; but it appears from the note in *Brooke* that the grant was holden void on account of the misnomer. The rule however is correctly stated in *Shepherd's Touch.* thus: "Where a grant doth intend to describe the person of the grantee by his proper name, and doth omit or mistake his Christian name or sirname, there for the most part the grant is void, unless there be some special matter to help it, as in the case before," referring to the addition of dignity or office. In the present case there is no such description in the deed; and the appearance of the party at the bar amounts to no more than signing the deed, and only identifies the person. There are many cases in which deeds have been holden void because signed by a wrong name, where no estoppel could take place: such is the case of *Field* v. *Winlow*, *Cro. Eliz.* 897. where the Plaintiff declared that the De-

1807.

Doe dem. Lushington v. The Lord Bishop of Landaff and Others.

fendant *James* by the name of *John* bound himself, and it was holden on demurrer that the action lay not, for *John* could not be *James*. To the same effect are *Watkins* v. *Oliver*, *Cro. Jac.* 558. *Hickman* v. *Shotbolt*, *Dyer*, 279. *b*. *Clark* v. *Istead*, 1 *Lutw.* 894. and *Maby* v. *Shepherd*, *Cro. Jac.* 640. In the latter case an action was brought against *John*, the executor of *Edmund Shepherd*, and the bond set forth was said to be the bond of *Edmund*, but it appeared that he was called *Edward* in the bond; and though it appeared that he signed by the right name *Edmund*, judgment was arrested. The reason constantly assigned is, that a man cannot have two Christian names; and this principle is recognized and acted upon, and the preceding cases considered in *Evans* v. *King*, *Willes*, 554. The various cases in which an estoppel has been allowed shew, that but for the estoppel the deed would have been void; for it is the essence of an estoppel to help those whom the rule of law would operate against. And it is expressly said in *Panton* v. *Chowles*, *Moore*, 897. where a woman named *Eleanor* had released by the name of *Ellen*, that the jury were right, on *non est factum*, in finding that it was not her deed, and that if the special matter had been found the Court must have holden the same; and that the party could only be aided in those cases where he might take advantage by estoppel. Here there is no ground for an estoppel. The Defendants do not claim under the recovery: and if they ought to be estopped from disputing it because they claim under the will of the vouchee, an easy answer might have been given to many of the cases which occur in the books, where the question has been whether a lessee under a second lease granted by a corporation in their right name, should prevail against a lessee or grantee under a former deed made by a wrong name. Such are the cases of *Croft* v. *Howell*, *Plowd.* 536. *Button* v. *Wrightman*, *Popham*, 56. Here the question is, whether the

1807.

DOE dem. LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

the will operates upon these lands; and if the deed to make a tenant to the præcipe conveyed nothing, the estate remained in the testator, and the will operated. 2dly, There are two grounds of revocation; one is an intention manifested to revoke, and another is a change of the estate. *Roe* d. *Noden* v. *Griffiths*, 4 *Burr.* 1960. In the cases cited of a bargain and sale without enrolment, and a feoffment without livery, the testator had done every thing in his power towards making a conveyance; he had taken the inchoate steps which he had authorized another to perfect. 8 *Vin. Abr.* 135. But here the deed was void *ab initio*. The cases in which a recovery has been deemed a revocation, do not depend upon intention, but upon the positive rule of law, which requires that the estate devised should continue in the testator; here the estate was not taken out of the testator, and therefore the will was not revoked. 3dly, The custom of gavelkind is the common law of the county of *Kent;* and all lands whatever lying in the county of *Kent* shall be presumed to be of the nature of gavelkind till the contrary be made to appear. *Robinson*, *Gavel.* 44. *Randall* v. *Riddal*, 3 *Keb.* 165. 214. It lies therefore upon the other side to shew that tithes are not subject to the custom. A rent-charge granted out of gavelkind lands within time of memory follows the nature of the lands. *Robinson*, 79. *et seq.* And if so, why should not tithes, when they come into lay hands? There are many documents referred to in *Selden on Tithes*, *cap.* 13. which shew that infeudations of tithes existed in the hands of laymen in *England* long prior to the statute of monasteries: and that they were common in other countries at a very early period appears from the same book, *cap.* 6. *s.* 4. If then these tithes might have been in lay hands previous to their consecration, it ought to be shewn that they never were descendible according to the custom; otherwise the custom, which is the common law of *Kent*, must be taken

to

1807.

DOE dem LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

to extend to them. And if they were ever descendible according to the custom, neither the transfer of them to a corporation, nor to the crown, nor the subsequent grant of them to be holden by knight service, will alter the descent; though that descent was suspended while they remained in the hands of the hospital and of the crown. *Robinson, p.* 62. 65. *et seq.*

June 16th.

On this day the opinion of the Court was delivered by

Sir JAMES MANSFIELD Ch. J. It was extremely proper that this case should be fully argued, as it has been. But after considering it, and attending to all the authorities referred to, and the argument, it does not appear to me to involve any very difficult question. The case turns upon the effect of the recovery which has been suffered. That a recovery, suffered by a testator after having made his will, is in general a revocation of the will, it is now too late to dispute. How it first came to be so decided it is not very easy to guess. Different reasons have been given in different cases. In *Dister* v. *Dister*, 3 *Lev.* 108. where tenant in tail suffered a recovery for the purpose of giving effect to his will, the Judges held that it was a revocation; and the reason given was, that the estate was changed by suffering the recovery. And that being the case of an estate tail, the estate certainly was changed; as was determined afterwards in the great case of *Martin* v. *Strachan* (*a*), where tenant in tail by purchase *secundum formam doni*, with a reversion in fee by descent, both *ex parte maternâ*, having suffered a recovery to the use of his own right heirs, it was resolved that the estate should descend to his heirs *ex parte paternâ*. But how a recovery of an estate in fee changes the estate it is difficult to say. So, however, it has

(*a*) 1 *Wils.* 2. 66. 2 *Stra.* 1179. 4 *Bro. P. C.* 486.

been

1807.

DOE dem. LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

been decided: and that it does put an end to a will cannot now be controverted. The reason given in some modern cases for such operation of a recovery is, that it shews an intention in the testator to revoke his will. But to me it appears very difficult to find out such intention. The only meaning of suffering a recovery is, that a doubt has been raised by some lawyer whether the recoveror has an estate in fee. In *Marwood* v. *Turner*, *3 P. Wms.* 165. the reason given is, that it shews an intention in the testator to give the estate to his heir. And in *Darley* v. *Darley*, *3 Wils.* 13. the same thing is said. If that were the true reason, it would afford a very important consideration in deciding one of the questions made in this case, namely, whether supposing the recovery not good, it would still operate as a revocation. But this question it will not be necessary to decide. As to the first point, whether the recovery is to be considered as a good recovery, after looking into all the cases, and considering the argument, we are of opinion, that for this purpose it is a good recovery. A recovery has all the forms of a real adverse suit. A writ against the tenant, the appearance of the tenant, a count against the tenant, voucher of the person who conveys to the tenant, and voucher over; then judgment is ultimately recovered by the demandant, and a recompence in value recovered from the last vouchee. If this were a real suit, it would be clear that the estate which was the subject of devise and of the suit was gone, and a recompence in value substituted. If therefore this were a real suit, we could not doubt of its operation in revoking a will. But this in fact is not a real suit, but a fictitious one. The whole foundation however upon which these recoveries have proceeded is, that the judges could not see that they were fictitious. As to the point then now under consideration, whether this be a perfect recovery, there is no doubt that in an adverse suit the tenant in fee could not falsify

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1807.

DOE dem LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

the recovery for want of a tenant to the *præcipe*, when he himself by entering into the warranty had admitted it. By that very act he admits on record that there is a tenant to the *præcipe;* and having done so, he is estopped as every man is by every material admission which he makes on record. To this effect is the case of the recognizance to a foreign corporation mentioned in Lord *Raymond* (*a*), and many others under the title *estoppel* in the books, The only answer given to this point was, that a common recovery is not an adverse suit. But the courts have always considered these recoveries in the same light as if they had been adverse suits. *Pigott Recov.* (*b*) when treating of common recoveries, says, a tenant in fee suffering a recovery is estopped, and cannot say that there is no tenant to the *præcipe*, for he has admitted it on record. I do not mention all the cases on the subject. They are mentioned in *Pigott*, and in the several abridgments. The decision of the judges has been, with respect to the point now under consideration, that no distinction is to be made between a real adverse suit, and such a suit as this, which is called a common recovery. We are therefore of opinion that the tenant in fee is estopped by what appears upon this record, and if living could not say that there is no good tenant to the *præcipe*. If then he would be estopped, every person claiming under him must be estopped also. As to this, it can hardly be necessary to cite cases. If *A*. be estopped by a recovery in such a manner as to make it good against himself, it must be good against those who derive title under him. In the case of *Trevivan* v. *Lawrence*, 1 *Salk*. 276. it was laid down, that if a man make a lease by indenture of *D*., in which he hath nothing, and after purchases *D*. in fee, and after bargains and sells it to *A*. and his heirs, *A*. shall be bound by this estoppel; and that where an

(*a*) *Henriques* v. *D. W. Ind. Company*, 2 *Ld. Raym.* 1535.

(*b*) P. 123.

estoppel

1807.

Doe dem. Lushington v. The Lord Bishop of Landaff and Others.

estoppel works on the interest of the lands, it runs with the lands into whose hands soever the land comes. There is another case mentioned in *Pollexfen* (*a*), which refers to *Bradstock* v. *Scovell*, *Cro. Car.* 434. There it was determined, that if the eldest son of tenant in tail levy a fine with proclamations in the life of his ancestor, and die without issue, living his ancestor, it shall not bar the second son, for the second son need not name him in a *formedon in descender*; but if the eldest son had survived his ancestor, the second son would have been barred. In like manner a devisee in a will must be estopped: for he claims through the testator who is himself estopped, and who could not give a better title to another than he had himself. For these reasons we think that the recovery, as far as respects this matter, is a good recovery, and that the will is thereby revoked. If we are right in thinking the tenant in fee estopped, it is unnecessary to consider the question respecting the admissibility of evidence; for no evidence could be heard. It is equally unnecessary for us to consider the other question as to the effect of the recovery, supposing it to be bad for want of a tenant to the *præcipe*. But on this point I will just observe, that it would be very difficult to say that this recovery, even though defective, did not amount to a revocation of the will. In the modern cases which I have alluded to, an intention to revoke has been presumed from the act of the testator; and if that be the true ground of holding a recovery a revocation, certainly the intention must be presumed as strongly in this case as in any. That the recovery was intended to be perfect no man can doubt. When the tenant in fee, who was the owner of the estate, conveyed it, he intended to make a perfect recovery; and if he did, it is difficult to distinguish the case from a feoffment without livery, or a bargain and sale without enrolment. They all shew an intention to part

(*a*) p. 61.

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1807.

DOE dem. LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

with the estate, though the act is not perfect. The reasoning in these cases seems to apply very strongly to the case of a defective recovery: but it is not necessary to determine that question. Having decided that the will is revoked, a subsequent question arises, how the premises are to descend. The case does not point out any distinction between the different parts of the rectory, but we suppose that it consists partly of land and partly of tithes (*a*); for it is very improbable that there should be a rectory without some land. With respect to any land which may belong to the rectory, it will fall under a different consideration from the tithe. It is said, that the land is not to be considered as descending according to the custom, because it had been long in the hands of an ecclesiastical corporation; and that in ancient times the land might not have been gavelkind when it first came to this body. But I think that it is impossible to distinguish the lands belonging to this rectory from other lands in *Kent*. The law of gavelkind is unlike other customs. It is not good if it begins only just before the reign of *Richard* the First. This custom existed long before any such customs, and almost before any history. In some places it is called the common law of *Kent*. In *Co. Lit.* 140. it is said, that the descent of land in *Kent* by gavelkind is of common right. The real history of the custom in *Kent* is, that the Conqueror granted to the people of *Kent* their pre-existing rights; having made a convention with them by which he permitted them to retain their ancient laws and customs. The descent by gavelkind was probably the rule of descent throughout the whole kingdom. *Robinson* gives a general history of the partible inheritances. Why females were excluded I cannot tell. In the time of the *Saxons* the natural mode of inheritance prevailed. Though from long habit we

(*a*) It was said at the bar, that there was no land annexed to the rectory.

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1807.

DOE dem. LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

are accustomed to consider the eldest son as entitled, there is nothing in the laws of nature, or in the relation between a father and his children, which gives the eldest son any right over his brothers and sisters. It is more natural that the estate should go to all the children after the death of the father. *Spelman* treats this custom as having been the general law of the kingdom. In *Selden's Analecta Anglo-Britannica* (*a*), in the second volume of his works, an account is given of the conquest and of the reigns shortly before. The common story of the *Kentish* men marching against the Conqueror in great numbers covered with boughs, and appearing like a moving wood, is there related, and the convention made with the Conqueror, by which they were permitted to retain their ancient laws and customs, is thus spoken of. *Illæsas hinc patrias retinuerunt consuetudines illamque imprimis quam leges* Anglorum *municipales* Gavelkind *nominant, quæ in toto regno, ante ducis adventum frequens et usitata fuit, postea cæteris adempta (sed privatis quorundam locorum consuetudinibus alibi postea regerminans)* Cantianis *solùm ex hac* Stigandi *et* Egelfini *armata intercessione integra et inviolata remansit* (*b*). *Spelman* in his *Glossary, voce Gavelkind*, calls the custom *Prisca Anglo-Saxonum consuetudo e Germania delata*, and supports his conjecture respecting its origin by a passage from *Tacitus* (*c*); *Haredes successoresque sui cuique liberi;* in which however no distinction is made between male and female. This very learned man and great antiquarian, as well as every other writer who looked into the subject, has considered this custom as part of the ancient law of *Kent* reserved to the *Kentish* men at the conquest. That being the general

(*a*) *Cap.* vii.

(*b*) It is to be observed, that *Robinson* considers the rule of partible inheritance to have remained at the common law applicable to soccage tenure till the reign of K. *John*. p. 22--26.

(*c*) *De Moribus Germanorum, cap.* 20.

law,

1807.

DOE dem. LUSHINGTON v. The Lord Bishop of LANDAFF and Others.

law, the appropriation in subsequent times of any portion of land to a religious house will not alter its nature. While in possession of the house, it could go to no children; but as soon as it was given up by the religious house, and granted by the crown, it must have been holden according to its ancient tenure. The custom of gavelkind then attached, and amongst other things the descent to all the sons equally. That being so, I need not say more on this part of the case, than that land belonging to this rectory is not distinguishable from any other land, and if there be any in this case it will descend according to the custom. With respect to the tithes, they will fall under a different consideration. As it certainly is now an established notion of law, that a layman was incapable of having any tithes until the dissolution of the monasteries, and that till that time tithes could only belong to the church, it is impossible that there could be any ancient descent with respect to them. They could not descend from ancestor to heir, because they could not be in the hands of any private individual. As to the tithes, therefore, they must descend entirely to the eldest son, according to the rules of descent at common law. The lessor of the Plaintiff therefore will be entitled to one sixth of the land, and to the whole of the tithes.

1807.

MARGEREM *v.* MAKILWAINE.

June 17th.

If Plaintiff take a plea out of the office and keep it, he waves any objection to the plea on the ground of its having been pleaded by a new attorney without any order to change the attorney.

THE declaration in this case having been delivered on the 4th of *June*, a plea was filed in the prothonotary's office on the 8th, which the Plaintiff took out of the office and kept; but the plea having been pleaded in the name of a different attorney from the attorney by whom the Defendant had appeared, and no order for changing the attorney having been obtained, the Plaintiff on the 10th signed judgment for want of a plea.

Best Serjt. having obtained a rule to shew cause why this judgment should not be set aside,

Shepherd Serjt. shewed cause, and contended that the plea was a nullity; and he cited *The King* v. *Horne*, 4 *Term Rep.* 349. to shew that taking proceedings out of the office is no waver of an irregularity.

But *The Court* (after consulting the officers) held that the Plaintiff by taking the plea out of the office, and keeping it, had treated it as more than a nullity, and therefore made the

Rule absolute.

END OF TRINITY TERM.

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INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN

BOSANQUET AND PULLER'S REPORTS,

And in the NEW REPORTS.

A.

ABATEMENT.

See ADDITIONS. COMMON, No. 1, 2. ESTOPPEL, No. 2. MISNOMER, No. 2, 3, 4. PLEADING, ii. 3. 7. vii. 2. PRACTICE, v. 21. TRIAL.

1. A WRIT in debt may be abated in part, and stand good for the remainder. *Powell* v. *Fullerton* *E.* 41 *G.* 3. 2 *B.* & *P. page* 420
2. If a plea in abatement contain matter which is in part abatement of the writ only, but conclude with a prayer that the whole writ may be abated, the Court may abate so much of the writ as the matter pleaded applies to. *ibid.*
3. To an action on the case in the form of tort against one of several joint owners of a ship for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant may plead in abatement that the goods were delivered to him and his partners jointly, and that his partners are not sued. *Powell* v. *Layton*, *M.* 47 *G.* 3 2 N. R. *page* 365

ACCOMPLICE.

See LARCENY.

ACTION ON THE CASE.

See ABATEMENT, No. 3. DEFAMATION. MARKET, 1. NUISANCE. PLEADING, i. 5, 6, 7. ii. 15, 16. v. 24. SHIP, No. 4. TIME, No. 2.

1. An action on the case to recover damages against the lessor of the Plaintiff

Plaintiff in a vexatious ejectment is not maintainable. *Purton* v. *Honnor*, *H.* 38 *G.* 3.
1 *B.* & *P. page* 205

2. An action on the case will not lie against a party suing out a writ, if he neglect to countermand it after payment of the debt. *Scheibel* v. *Fairbain and another*, *E.* 39 *G.* 3.
1 *B.* & *P.* 388

3. At least, unless malice be averred. *ibid.*

4. In an action for maliciously holding to bail, it is not sufficient to prove that the writ was sued out after payment of the debt, if the circumstances afford no inference of malice; but in such case evidence of actual malice must be given. *Gibson* v. *Chaters*, *E.* 10 *G.* 3.
2 *B.* & *P.* 129

5. In an action on the case for giving a false character to a tradesman, whereby he was induced to trust an insolvent person, the Court held that fraud was necessary to support the action, but set aside a verdict for the Plaintiff on payment of costs, though there were some circumstances in the case from which fraud might be inferred, on a suspicion that the inquiry was made of the Defendant with a view to entrap him, and thereby obtain his guarantee for payment of the Debt contracted by the insolvent. *Tapp* v. *Lee*, *E.* 43 *G.* 3. 3 *B.* & *P.* 367

6. An action on the case does not lie for permissive waste. *Gibson* v. *Wells*, *T.* 45 *G.* 3. 1 N. R. 290

7. If *A.* fraudulently represent the circumstances of *B.* to be good, in order to induce *C.* to give him credit, and add "if he does not pay for the goods, I will," an action may be maintained against *A.* for the misrepresentation, notwithstanding the addition of the promise. *Hamer* v. *Alexander*, *T.* 46 *G.* 3. 2 N. R. *page* 241

ACTION, LIMITATIONS OF,

See LIMITATIONS OF ACTIONS.

ACTION PERSONAL.

An action of covenant for not levying a fine is a personal action within the meaning of the 13 *G.* 3. *c.* 51. *s.* 1. which empowers the Judge to certify the Defendant's residence in *Wales*, if the verdict be under 10*l.*, in order that a nonsuit may be entered. *Davies* v. *Jones*, *E.* 45 *G.* 3. 1 N. R. 267

ACT OF PARLIAMENT,

See BANKRUPT, iii. 16.

ADDITIONS,

See AFFIDAVIT TO HOLD TO BAIL, No. 27. NOTICE OF ACTION.

No addition having been given to the Defendant either in the recital of the writ or in the subsequent part of the declaration, the Defendant pleaded the statute of additions 1 *H.* 5. in abatement, and prayed judgment of the declaration. The Court held the plea a nullity, and gave leave to the Plaintiff to sign judgment. *Gray* v. *Sidneff*, *E.* 43 *G.* 3. 3 *B.* & *P.* 395

ADMINISTRATION,

See EXECUTOR AND ADMINISTRATOR.

ADMINISTRATOR,

See EXECUTOR AND ADMINISTRATOR.

ADMIRALTY,

See EVIDENCE, ii. 35. PRIZE, No. 1.

ADULTERY,

See BARON AND FEME, No. 1, 2. 12.

AFFIDAVIT,

See BAIL, ii. 11. EJECTMENT, No. 6. PRACTICE, v. 17.

1. A rule was discharged because the affidavit on which the rule nisi was obtained, was not entitled in any court, the words "in the" only being prefixed. *Osborn* v. *Tatum*, *E.* 38 *G.* 3. 1 *B. & P. page* 271
2. An affidavit to found a rule for staying proceedings on a bail-bond, should be entitled in the action against the bail. *Roberts* v. *Giddins*, *M.* 39 *G.* 3. 1 *B. & P.* 337
3. An affidavit to found a rule for setting aside an attachment against the sheriff, should be entitled, The King against the sheriff of ——. *Clempson* v. *Knox*, *M.* 42 *G.* 3. 2 *B. & P.* 517. *n.*
4. The affidavit of acknowledgment of a fine made by one of the commissioners, in *France*, but not signed, appearing to be in the same handwriting as his signature to the acknowledgment at the foot of the *præcipe*, and concord, and indorsement on the writ; and such affidavit having been taken and attested in *France* by two *English* magistrates on account of an exorbitant demand of per centage on the part of the *French* officer authorized to take affidavits; the Court allowed the fine to pass. *Lovibond* v. *Sir J. Morshead, Bart. et Ux. M.* 46 *Geo.* 3. 2 N. R. *page* 57

AFFIDAVIT TO HOLD TO BAIL,

See PRACTICE ii. VARIANCE 14.

1. An affidavit to hold to bail, made by a third person, need not state a connection between the deponent and the plaintiff. *Pieters and Another* v. *Luytjes*, *E.* 37 *G.* 3. 1 *B. & P.* 1
2. If an affidavit to hold to bail be intituled "*A. B.* Plaintiff, and *C. D.* Defendant," it is bad, and the Defendant may be discharged on entering a common appearance. *Hollis* v. *Brandon*, *E.* 37 *G.* 3. 1 *B. & P.* 36
3. The Court will not order a bail bond to be delivered up to be cancelled, because the place where the affidavit to hold to bail was sworn, is not mentioned in the jurat. *Symmers* v. *Watson*, *M.* 38 *G.* 3. 1 *B. & P.* 105
4. A Defendant by perfecting bail above was held to wave all objections arising from the bank act, 37 *G.* 3. *c.* 45. to the sufficiency of the affidavit on which he was held to bail. *Chapman* v. *Snow*, *M.* 38 *G.* 3. 1 *B. & P.* 132. *n.*
5. An affidavit to hold to bail made in *Ireland* only two days after the passing of the bank act, 37 *G.* 3. *c.* 45. was held bad as not complying with its provisions. *Stewart* v. *Smith*, *M.* 38 *G.* 3. 1 *B. & P.* 132. *n.*
6. And a supplemental affidavit was refused, *ibid.*
7. Bailable process was sued out previous

vious to the passing of 37 *G.* 3. *c.* 45. which regulates the form of the affidavit to hold to bail; this process was renewed four several times without any new affidavit, and the fourth renewal, on which the Defendant was arrested, was subsequent to the passing of the above act; held, no objection to such process that it was founded on an affidavit not complying with the 37 *G.* 3. *c.* 45. *Crooks, one, &c.* v. *Holditch, M.* 38 *G.* 3.
1 *B. & P. page* 176

8. If an affidavit to hold to bail be entitled it is bad. *Green* v. *Redshaw, E.* 38 *G.* 3. 1 *B. & P.* 227.

9. The Court of *C. B.* will never allow a supplemental affidavit, except to explain an ambiguity in the original affidavit. *Green v. Redshaw, E.* 38 *G.* 3. 1 *B. & P. ibid.*

10. An affidavit to hold to bail stating that *J. S.* has made no tender to pay in notes of the bank of *England*, excludes the possibility of any other person having tendered for him, and sufficiently complies with 37 *G.* 3. *c.* 45. *s.* 9. *Wyatt and others* v. *Smee, M.* 39 *G.* 3.
1 *B. & P.* 344.

11. An affidavit to hold to bail, stating the Defendant to be indebted "for damages awarded, and for costs and expences taxed and allowed," is sufficiently certain, for it will be inferred that the award and taxation were such as to support the action. *Jenkins* v. *Law, H.* 39 *G.* 3. 1 *B. & P.* 365

12. If an affidavit to hold to bail, state the circumstances under which a debt accrued, and conclude "by reason whereof the Defendant stands indebted in £. which he hath refused and still refuseth to pay," it is bad. *Fowler* v. *Morton, M.* 40 *G.* 3. 2 *B. & P. page* 48

13. If such an affidavit negative a tender "in notes of the bank of England payable on demand," it is a sufficient compliance with the 37 *G.* 3. *c.* 45. *s.* 9. though the words of that act are "expressed to be payable on demand." *ibid. ibid.*

14. If a Plaintiff executor hold a Defendant to bail upon an affidavit stating the debt to be due, "as appears by the testator's books," but omitting to add, "and which the deponent believes to be true," the Court of *C. B.* will allow the Plaintiff to swear to his belief in a supplemental affidavit. *Garnham Executrix* v. *Hammond, M.* 41 *G.* 3.
2 *B. & P.* 298

15. If an affidavit to hold to bail made by the Plaintiff's clerk expressly negative a tender in bank notes, it is bad. *Smith* v. *Tyson, M.* 41 *G.* 3. 2 *B. & P.* 339
Hammersley v. *Mitchell, E.* 41 *G.* 3. S. P. 389
Contrà, K. B. *Madox* v. *Abercromby, H.* 41 *G.* 3. *ibid. n.*

16. In an affidavit to hold to bail the Plaintiff deposed that, at the time of the assignment therein after mentioned, the Defendant was indebted to him on a bill of exchange, and that he afterwards assigned the debt by indenture to *A. B. C.* and *D.* in trust: *A.* then deposed, that, at the time of the affidavit being made, the Defendant was indebted to them *A. B. C.* and *D.* as such assignees and trustees as aforesaid. Held that the affidavit

affidavit was insufficient, because it did not deny that the debt had been satisfied to the Plaintiff, between the assignment and the time of the affidavit being made. *Mann* v. *Sheriff*, *H.* 41 *G.* 3.
2 *B.* & *P. page* 355

17. But a supplemental affidavit was allowed. *ibid. ibid.*

18. A person employed in *London* as agent to one residing at a distance in the country, with a power of attorney to collect his debts, may make an affidavit of debt, positively denying any tender in bank notes. *Chatterley* v. *Finck*, *E.* 41 *G.* 3.
2 *B.* & *P.* 390

19. An affidavit of debt made by one of three partners, denying any tender in bank notes to himself, or either of his partners to the best of his knowledge and belief is sufficient. *Stacey* v. *Federici*, *E.* 41 *G.* 3. 2 *B.* & *P.* 390

20. An affidavit to hold to bail in which a tender in bank notes is negatived by the Plaintiff's clerk alone, then resident in *London*, is insufficient, if the Plaintiff be also resident in *London*, though the debt arose upon a bill transaction, of which the clerk had the sole management. *Bolt* v. *Miller*, *E.* 41 *G.* 3. 2 *B.* & *P.* 420

21. If an affidavit to hold to bail be made by a person prima facie incompetent to make it. *Qu.* Whether circumstances proving him to be competent can be shewn by affidavit for cause against a rule for discharging the Defendant on a common appearance? 2 *B.* & *P.* 420

22. The Court will not set aside proceedings and order the bail-bond to be delivered up, because a Defendant has been arrested on a special capias, in which, as well as in the affidavit to hold to bail, the initials only of his Christian name were inserted. *Howell* v. *Coleman*, *T.* 41 *G.* 3. 2 *B.* & *P. page* 466

23. Affidavit to hold to bail made by *A.* in respect of a debt due to *B.* before his discharge under an insolvent act, whereby *B.*'s estate became vested in the clerk of the peace, and negativing a tender in bank notes to the knowledge or belief of *A.* held sufficient, the Court allowing *A.* and *B.* by a subsequent affidavit, to shew that *A.* usually transacted *B.*'s business when out of town, and that at the time when the affidavit to hold to bail was made, *B.* was out of town, and that an immediate arrest was necessary, as the Defendant was about to sail on a voyage. *Lawson* v. *M'Donald*, *M.* 42 *G.* 3.
2 *B.* & *P.* 590

24. An affidavit to hold to bail made by the administrators of a person who died before the passing of the bank act need not negative a tender in bank notes to their intestate. *Percy* v. *Powell*, *H.* 42 *G.* 3.
3 *B.* & *P.* 6

25. *Semb.* That a person suing as administrator need not negative such a tender to their intestate. *ibid. ibid.*

26. In an action by the assignees of a bankrupt, it is not sufficient for the bankrupt to negative a tender in bank notes in the affidavit to hold to bail. *Smith* v. *Barclay*, *M.* 43 *G.* 3. 3 *B.* & *P.* 219

27. In an affidavit to hold to bail the addition of "manufacturer" to the deponent's

deponent's name is sufficient. *Smith* v. *Younger*, *M.* 44 *G.* 3.
3 *B.* & *P. page* 550

28. An affidavit to hold to bail which stated the Defendant to be indebted to the Plaintiff as indorsee of a bill of exchange without alleging the bill to have become due, was held sufficient. *Davison* v. *March*, *H.* 45 *G.* 3. 1 N. R. 157

AGENCY,

See AGENT.

AGENT,

See AFFIDAVIT TO HOLD TO BAIL, No. 18. EVIDENCE, ii. 17. 31. INSURANCE, i. 2, 3, 4, 5, 6. LIEN, No. 7. NUISANCE, No. 1. PLEADING, ii. 16. iv. 4.

1. *A.* entrustd *B.* with goods to sell in *India*, agreeing to take back from *B.* what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price. *B.* not being able to sell the goods in *India* himself, left them with an agent to be disposed of by him, directing the agent to remit the money to him (*B.*) in *England*. Held that *A.* could not maintain trover against *B.* for the goods. *Bromley* v. *Coxwell*, *E.* 41 *G.* 3. 2 *B.* & *P.* 438

2. And it seems that he could not maintain any action. *ibid. ibid.*

AGREEMENT,

See ALIEN. ASSUMPSIT, No. 2. 4. COVENANT. EVIDENCE, ii. 20. iii. 2. FORESTALLING, FRAUDS, STATUTE OF, No. 3. 7. INSURANCE, ii. 2. 16. MONEY HAD AND RECEIVED, No. 9, 10. 12. PENALTY. PLEADING, i. 1. ii. 9. v. 18. 33. 36. 38. STAMPS. TROVER. VARIANCE, No. 8. 12. 16.

1. *A.* being tenant to *B.* under a lease containing covenants, by which the former was bound to fetch 75 bushels of coals from *Pool* yearly, and deliver them at the mansion house of the latter, and also to supply him with as much good wheat as he should want in his family at five shillings per bushel, it was agreed between them that the lease should be surrendered up, and a new one granted, omitting the above covenants. A new lease was accordingly executed, and at the same time an agreement was entered into whereby *A.* agreed with *B.* that he would fetch and bring to the dwelling-house of *B.*, his heirs and assigns, 75 bushels of coals yearly for 12 years, (the term of the new lease), and yearly supply *B.*, his heirs and assigns, with as much good wheat as he should want in his family at five shillings per bushel. *B.* having parted with his reversion in the farm, and also quitted the mansion house in which he resided at the time when the agreement was made; held that he was not entitled to maintain an action against *A.* for refusing to deliver the wheat at the stipulated price; that the agreement being entire must receive one uniform construction, and as it was clearly local in respect of the delivery of coals, it could not be deemed personal with respect

respect to the wheat. *Coker* v. *Guy*, *M.* 42 *G.* 3. 2 *B.* & *P. page* 565

2. Held also that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity. *ibid.*

3. *A.* agreed to underlet his house to *B.* the latter paying for the furniture at an appraisement; held that *B.* was excused from the performance of the agreement, because *A.* at the time he quitted the house, was in arrear for rent to his landlord. *Partridge* v. *Sowerby*, *T.* 42 *G.* 3. 3 *B.* & *P.* 172

4. If a *British* merchant charter a *Swedish* ship on a voyage to *St. Michael's* for a cargo of fruit, and the charter-party contain the usual exception against the restraint of princes, and the ship be prevented from reaching *St. Michael's* within the fruit season, by an embargo laid on *Swedish* vessels by the *British* government, the *Swedish* owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the *British* merchant. *Touteng* v. *Hubbard*, *M.* 43 *G.* 3. 3 *B.* & *P.* 291

5. If *A.* contract with *B.* to fetch a cargo of corn from *C.*, and on his arrival there find that the government has prohibited the exportation of corn, and therefore, after staying out his demurrage days return in ballast: *B.* is notwithstanding liable to pay freight but not demurrage, if he knew of the prohibition before he entered the port of *C.*, though allowed demurrage by the contract. *Blight* v. *Page*, Sittings after *Mich. T.* 1801. *cor.* Lord *Kenyon.* 3 *B.* & *P. page* 295 *notis.*

6. In assumpsit the Plaintiff declared on an agreement by the Defendant not to avail himself or take any undue advantage of a communication made to him by the Plaintiff of an invention for which the Plaintiff intended to take out a patent, and assigned as a breach that the Defendant fraudulently obtained a patent for the invention in his own name. Evidence that the Defendant fraudulently obtained a patent in his own name, which the Plaintiff afterwards agreed should remain in the Defendant's name upon certain terms, which terms the Defendant before the commencement of the action had renounced, insisting upon the invention as his own, was held to maintain this breach. *Smith* v. *Dickenson*. *H.* 44 *G.* 3. 3 *B.* & *P.* 630

7. One agreed to deliver 100 bags of hops at a certain price by a certain time, and having delivered part, commenced an action for the price thereof before the expiration of the time for the delivery of the remainder. Held that such action could not be maintained, the contract being entire. *Waddington* v. *Oliver*, *M.* 46 *G.* 3. 2 N. R. 61

8. *A. B. C.* and *D.* agreed to purchase a cargo of coals, in certain proportions, to be severally taken and received out of the ship by them respectively at the rate of 40 chaldrons per day, and to settle their turns among themselves; and further agreed, that in case of any loss or demurrage, by not fixing on their respective turns, or by subsequent

quent detention in working out the cargo, to hold themselves severally and respectively liable for their several and respective defaults: at the rate of 40 chaldrons per day, the whole cargo would have been cleared in nine days; but in consequence of one of the days being wet, only five chaldrons were taken out on that day; and on the 10th day some of *A.*'s coals remained on board: held that working days only were within the meaning of the contract, and that as one day was wet, *A.* was not bound to pay demurrage for the 10th day. *Harper* v. *M'Carthy and another*, *T.* 46 *G.* 3. 2 N. R. *page* 258

9. If there be a clause in a ship's articles that the seamen may leave at the end of three months, if the ship is in port, or in perfect safety, of which the captain is to be the sole judge, and the ship be in port and safety after three months, the seamen may leave the ship without the permission of the captain. *Neave* v. *Pratt*, *E.* 47 *G.* 3. 2 N. R. 408

10. If *A.* promise the bail in consideration of certain reasonable reward to render the Defendant within due time according to the practice of the Court, and proceedings be commenced against the bail, pending a writ of error: *A.* is not bound to indemnify the bail against such tortious proceedings. *Bayley* v. *Tucker*, *T.* 47 *G.* 3. 2 N. R. 458

AID-PRAYER.

1. Aid-prayer is a dilatory plea within the 4 *Ann.* *c.* 16. and must be verified by affidavit. *Onslow* v. *Smith*, *E.* 41 *G.* 3. 2 *B. & P.* 384

2. If the tenant in a writ of right pray aid after a general imparlance, it is a good cause of demurrer, and the Court will give judgment thereupon, that the tenant answer alone. 2 *B. & P. page* 384

ALIEN,

See BANKRUPT, i. No. 2. CONTRACT, No. 1.

The Defendant an alien within the terms of the 38 *G.* 3. *c.* 50. *s.* 9. (which exempts from arrest for debts contracted abroad, aliens residing in this country in consequence of a revolution in their own,) having entered into an agreement with the Plaintiff in a foreign country, the latter, in pursuance of the agreement, laid out money in *England;* after which the parties came to an adjustment in *England*, and the Defendant acknowledged the debt. The Defendant having been holden to bail for money laid out by the Plaintiff in *England*, and on an account stated in *England*, disclosed the above circumstances by affidavit, whereupon the Court discharged him on a common appearance. *Sinclair* v. *Charles Phillipe*, *Monsieur de France*, *H.* 41 *G.* 3. 2 *B. & P.* 363

ALIEN, ENEMY,

See ENEMY. PRACTICE, iii. 3. 10.

ALLEGIANCE,

See SUBJECT.

AMENDMENT,

See BAIL PIECE. COMMON RECOVERY, No. 3. 5, 6, 7. 9. EVI-

DENCE, ii. 1. FINE, No. 5. RIGHT, WRIT OF, No. 2, 3, 4, 5. VERDICT, No. 1.

1. If there be not fifteen days between the teste and return of a capias, it may be amended. *Davis, One, &c. Assignee of the Sheriff* v. *Owen and Another*, *M.* 39 *G.* 3. 1 *B. & P. page* 342

2. One obligee in a joint-bond having sued out a capias against the obligor, and taken a recognizance of bail in his own name only, afterwards sued out an original in the name of both obligors, and then applied to the Court to amend both the capias and the recognizance; the Court granted the former but refused the latter. *Tabrum* v. *Tenant*, *E.* 36 *G.* 3. 1 *B. & P.* 481

3. *A. B.* having been arrested on a capias sued out against him by the name of *B. C.*; a bail-bond was given, by which *A. B.*, arrested by the name of *B. C.* became bound, conditioned for the appearance of *A. B.* arrested by the name of *B. C.* The affidavit to hold to bail named the Defendant properly *A. B.* The Court amended the capias and return (but without prejudice to the sheriff,) and rejected an application by the bail to set aside the bail-bond. *Stevenson* v. *Danvers*, *H.* 40 *G.* 3. 2 *B. & P.* 109

4. A fieri facias against bail in error may be amended by the record of the recognizance. *Perkins* v. *Petit*, *T.* 40 *G.* 3. 2 *B. & P.* 275

5. A fieri facias being made returnable on a *K. B.* return day, instead of a *C. B.* return day, was amended by the record of execution on the roll. *Atkinson* v. *Newton*, *M.* 41 *G.* 3. 2 *B. & P. page* 336

6. The Court of C. B. refused to amend a scire facias against bail. *Fulwood* v. *Annis*, *H.* 43 *G.* 3. 3 *B. & P.* 321

7. In an action on the statute of usury for taking more than legal interest on a loan of money "from the 15th of *April* to the 14th of *July* 1802," the Court will amend the verdict by the Judge's notes, if the jury by mistaking the date of an instrument create a variance in their special finding, for which the evidence affords no foundation. *Manners qui tam* v. *Postan*, *H.* 43 *G.* 3. 3 *B. & P.* 313

8. If one of the deeds to lead the uses of a fine, viz. the lease, contain the word "tithes," but the other deed, viz. the release, omit that word, the Court will not amend the writ of entry by inserting the word "tithes," though the release has the words "and also all houses, ways, &c. hereditaments and appurtenances whatsoever to the said messuages, lands, &c. belonging, or in any way appertaining." *Phillips* v. *Jones*, *E.* 43 *G.* 3. 3 *B. & P.* 362

9. If to a rejoinder concluding with a verification the Plaintiff add the *similiter*, and take the record down to trial, and the Defendant obtain a verdict, the Court will not grant a new trial, but will amend the record. *Grundy* v. *Mell*, *E.* 44 *G.* 3. 1 N. R. 28

10. The Court refused to allow an amendment of a declaration in *scire facias* against bail, who had failed to

to surrender their principal (then in custody), before the quarto die post of the second writ. *Stevenson* v. *Grant and Another*, *H.* 46 *G.* 3. 2 N. R. *page* 103

11. A *testatum capias* having been made returnable on a day certain, instead of a general return day, was held irregular. And the Court refused to amend it on account of the bail. *Inman* v. *Huish*, *H.* 46 *G.* 3. 2 N. R. 133

AMERICA,

See SUBJECT, No. 1, 2. TRADE, No. 1, 2.

ANNUITY,

See CONDITION, No. 5. COSTS, ii. 4. PLEADING, v. 37.

1. If an annuity deed contain a proviso that the grantor shall re-purchase, the memorial of such deed must state the proviso, and the terms and conditions of redemption: if it only refer to the deed, and state the annuity to be redeemable "on such notice, terms, and conditions as are therein expressed," it does not sufficiently comply with the 17 *G.* 3. *c.* 26. *s.* 1. *Ex parte Ansell and Another*, *T.* 37 *G.* 3. 1 *B.* & *P.* 62

2. The hand by which payment is made need not be stated in the memorial, though it must in the deed. *ibid.* 63 *n.*

3. If any part of the consideration of an annuity be paid in country bank-notes, the dates and times of payment must be set out in the memorial under 17 *G.* 3. *c.* 26. *Morris* v. *Wall*, *H.* 38 *G.* 3. 1 *B.* & *P.* 208

4. An annuity memorial, stating that the consideration money was paid to *A.*, *B.*, and *C.* "some or one of them," is bad: though it appear that the money was paid on the day on which the deed was executed by them all. *Vaux* v. *Ansell*, *E.* 38 *G.* 3. 1 *B.* & *P. page* 224

5. If several persons who have purchased annuities of *A.* agree to give up those annuities on receiving a certain sum of money, and a bond payable at a future day, they retaining their annuity securities till the bond becomes payable, the Court cannot under 17 *G.* 3. *c.* 26. order any of the securities so retained to be delivered up though they may be void. *Sir Harry Goring*, *Bart.* v. *Welles*, *Clerk*, *E.* 39 *G.* 3. 1 *B.* & *P.* 395

6. At least not unless the creditors attempt to set them up again as annuity securities on non-payment of the stipulated sum, or the bond proving bad. *ibid.*

7. *Semb.* That after payment of the money and delivery of the bond to the creditors, their debt is satisfied, whether the bond prove good or bad. *ibid.*

8. If a bond and warrant of attorney given to secure an annuity, be no otherwise noticed in the memorial than by way of recital in the annuity deed which is set out, it is not a sufficient compliance with 17 *G.* 3. *c.* 26. *Van Braam* v. *Isaacs*, *T.* 39 *G.* 3. 1 *B.* & *P.* 451

9. Nor can the Court refuse to interfere on the ground of 18 years having elapsed since the grant, and the grantee being dead. *ibid.*

10. The

10. The Court cannot order an annuity bond to be delivered up to be cancelled for want of a memorial, pursuant to 17 *G.* 3. *c.* 26. though it be void by the first section of that act. *Symonds et Ux.* v. *Cobourne*, *E.* 36 *G.* 3.
1 *B. & P. page* 482

11. *Qu.* Whether in such a case they would stay proceedings on the bond? *ibid.*

12. At the time of executing an annuity deed, one *R. W.* the agent of *J. C.*, the grantee, entered into an agreement for redemption, beginning thus: "Memorandum, I undertake and agree," &c. and concluding, "Witness my hand *R. W.*, agent for *J. C.*" The memorial stated that *J. C.* entered into the agreement by *R. W.* his agent, and that it was witnessed by *R. W.*: held that the memorial was sufficient. *Cator* v. *Hoste*, *M.* 42 *G.* 3.
2 *B. & P.* 557

13. If in the deed securing an annuity, it be declared that the judgment to be obtained under a warrant of attorney given at the same time, shall be only a collateral security for the regular payment of the annuity, and that no execution shall issue thereon till default made in the payment for 14 days, and the memorial does not notice the above declaration, and in setting forth the warrant of attorney, only states generally that "such warrant of attorney was executed for the better securing the payment of the annuity, as in the above stated deed is particularly mentioned," the Court will set aside the annuity for such defect in the memorial. *Cunningham* v. *Mackenzie*, *M.* 42 *G.* 3.
2 *B. & P. page* 598

14. If the memorial of an annuity deed between *A.*, *B.*, and *C.*, after describing the parties to the deed and the contents, state that it was executed by *A.* and *C.* in the presence of *E.* and *F.*, it will be no objection that *B.* also executed it in the presence of the same parties. For it is sufficient if the memorial state all the subscribing witnesses, without specifying what signatures they respectively attested. *Orton* v. *Knight*, *E.* 42 *G.* 3. 3 *B. & P.* 153

15. If the memorial only state the time at which execution may be sued out by words of reference to the deed, it is fatal. *ibid.*

16. Certain premises were conveyed by deed to a trustee to secure an annuity, in trust, if the annuity should be in arrear 60 days, by lease, sale or mortgage, to raise the arrears, and permit the person entitled to the freehold to receive the rents and profits of the residue, and he was created a trustee for the grantor till default of payment. The memorial of the annuity described the trustee to be "a trustee nominated on the part of the grantee," without stating any of the trusts: held, that it did not sufficiently describe the person for whom he was trustee according to the 17 *G.* 3. *c.* 26. *Askew* v. *Mackreth*, *H.* 45 *G.* 3. 1 N. R. 214

17. If the consideration for an annuity be paid by the clerk to the bankers of the grantee, the deed by which the annuity is granted must specify the

the name of such clerk, and describe him as the person by whom the consideration was actually paid. 1 N. R. *page* 214

18. If the consideration of an annuity be paid to the agent of the grantor, the name of such agent need not be inserted in the annuity deed. *Craufurd* v. *Phillips*, *H.* 46 *G.* 3. 2 N. R. 141

19. And if the consideration be alleged in the deed to have been paid on a particular day, on which day it was paid to the common agent of both parties, who were at a distance from each other, and by him paid over in a few days afterwards to the grantor on his executing the deed, this is a sufficient allegation of the time of payment within the 17 *G.* 3. *c.* 26. *ibid.*

APPEAL,

See TRESPASS, No. 2.

APPEARANCE,

See BAIL, i. 1, 2, 11. iv. 1. BANKRUPT, ii. 3. 10. BARON AND FEME, No. 10. PARTNERS, No. 5. PRACTICE, ii. v. 13. VARIANCE, No. 17.

APPURTENANCES,

See DEVISE, i. 1, 2, 3. WAY, RIGHT OF.

ARBITRATION,

See ATTACHMENT, No. 1, 2. COSTS, i. 1, 2. VENUE, No. 5, 6.

1. The Court will not grant an attachment for non-performance of an award pending an action brought on the award; nor allow the Plaintiff to wave the action in order to apply for the attachment. *Badley* v. *Loveday*, *T.* 37 *G.* 3. 1 *B.* & *P. page* 81

2. The Court will not set aside an award on the ground of the witnesses not having been examined on oath, if no such objection was made at the time of their examination. *Ridout* v. *Pye*, *M.* 38 *G.* 3. 1 *B.* & *P.* 91

3. The Court will give leave in the first instance to enter up judgment on a verdict reduced by an award. *Higginson* v. *Nesbitt*, *M.* 38 *G.* 3. 1 *B.* & *P.* 97

4. It is no ground for setting aside an award that one of the Defendant's witnesses was re-examined by the arbitrator after the evidence was closed on both sides, and the plaintiff's attorney gone, though, by a different testimony from what he gave at first, the arbitrator's opinion was influenced. *Atkinson* v. *Abraham*, *M.* 38 *G.* 3. 1 *B.* & *P.* 175

5. Unless such re-examination appear to have been brought about by the management of the Defendant's attorney. *ibid.*

6. If the damages given by a verdict be reduced by an award, under an order of Nisi Prius, which has been made a rule of Court, the party is entitled to have the postea delivered to him without any application to the Court. *Grimes* v. *Naish*, *E.* 36 *G.* 3. 1 *B.* & *P.* 480

7. If *A.* and *B.*, in consideration of a sum of money paid by one to the other, enter into partnership, and covenant, in case of a dissolution of the partnership, to submit all matters

matters relating thereto to arbitration; the arbitrators are not thereby authorized to determine whether any part of the sum of money which was the consideration of the partnership shall be refunded. *Tattersall* v. *Groote*, *E.* 40 *G.* 3. 2 *B.* & *P. page* 131

8. It seems that no action can be maintained for refusing to nominate an arbitrator in pursuance of a covenant to refer matters to arbitration. *ibid.*

9. If a debt arising out of an illegal transaction due from one of two partners to the other, be referred, together with other causes of dispute, to an arbitrator, who awards a sum due from one partner to the other, expressly on account of such debt, the Court will set aside that part of the award. *Aubert* v. *Maze*, *H.* 41 *G.* 3. 2 *B.* & *P.* 371

10. If a bond of submission to arbitration between a trustee of a wife and her husband recite, that a suit for separation has been instituted between the husband and wife in the Commons, and that in order to put an end to any contest about the terms of separation, it had been agreed that all matters should be referred to *J. S.*, and either of the parties should be "at liberty to apply to the Court to make the award a rule of Court;" such submission may be made a rule of the Court of Common Pleas under stat. 9 & 10 *W.* 3. c. 15. *Soilleux* v. *Herbst*, *E.* 41 *G.* 3. 2 *B.* & *P.* 444

11. If a verdict for a Plaintiff be taken at Nisi Prius, subject to the award of an arbitrator, and the rule of reference be made a rule of Court, the verdict may be entered according to the award of the arbitrator, without any application to the Court for that purpose. *Borrowdale* v. *Hitchener*, *M.* 43 *G.* 3. 3 *B.* & *P. page* 244

12. If in such a case the award be made before the term, the Defendant can only impeach it within the four first days of term. *ibid.*

13. Personal service of the award is not necessary to warrant the issuing of execution in such case, if the attorney of the Defendant has been served with the award. *ibid.*

ARREST,

See AFFIDAVIT TO HOLD TO BAIL. ALIEN. ATTORNEY, No. 1, 2. BAIL, i. BARON AND FEME. EVIDENCE, ii. 33. FOREIGN LAWS. LUNATIC. PRACTICE, ii. PROCESS, No. 3. TRESPASS, No. 3, 4. VARIANCE, No. 5.

1. An attachment for non-payment of money to *A.* having issued against *B.* from this Court, and the process being in the hands of an officer who had not been able to serve *B.* therewith, *B.* was met by *A.* in the street, and carried by violence to the chambers of *C.*, who was *A.*'s attorney, and there detained while the original process was sent for, and served upon him; the officer was also sent for, (but not by *A.*) and on *B.*'s leaving the chambers of *C.* he was arrested. The Court held this arrest illegal, and discharged *B.* *Birch* v. *Prodger*, *M.* 45 *G.* 3. 1 N. R. 135

2. If a magistrate's warrant be shewn by the constable who has the execution of it, to the person charged with

with an offence, and he thereupon, without compulsion, attend the constable to the magistrate, and after examination be dismissed, it seems this is not such an arrest as will support trespass and false imprisonment. *Arrowsmith* v. *Le Mesurier*, *T.* 46 *G.* 3.

2 N. R. *page* 211

ASSAULT,

See DAMAGES. PLEADING, v. 15.

ASSESSMENT,

See COPYHOLD, No. 2. RATE. TAXES.

ASSIGNEES OF BANKRUPT,

See BANKRUPT, i. 4. ii. 7. iii. 1. 4. 6. 10. 12, 13, 14, 15. 17. PLEADING, ii. 11.

ASSIGNMENT,

See BANKRUPT, iii. No. 10. 15, 16, 17. CONDITION, No. 5. COVENANT, No. 8. DEED. DOWER. EVIDENCE, i. 3. iii. 2. INSOLVENT, No. 3. PLEADING, iii. 1. STAMPS, No. 8. TROVER, No. 2.

There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of the lease, although such person neither takes actual possession nor receives the lease. *Taylor* v. *Shum and others*, *E.* 37 *G.* 3.

1 *B.* & *P.* 21

ASSUMPSIT,

See AGREEMENT. BARON AND FEME, No. 13. CONTRIBUTION. GOODS SOLD AND DELIVERED. MONEY MAD AND RECEIVED. PAYMENT, No. 2. PENALTY. PLEADING, ii. 6. 11. iii. 11, 12. v. 16. 29, 30. 33. 36. SALVAGE. SLAVE. VARIANCE, No. 16.

1. *A.* declared against *B.* and his wife as administratrix with the will annexed of *C.* deceased; "for that whereas *C.* died intestate, possessed of South-Sea stock, which she held in trust for *A.*, and upon which certain dividends were due; in consideration that *A.*, at the request of *B.* and his wife, had procured administration to be granted to the wife of *B.* as residuary legatee of *C.*, with the will annexed, for the purpose of obtaining payment of the said dividends, and agreed to bear the expences of obtaining such administration, and to furnish evidence to entitle them to the payment of the said dividends; *B.* and his wife as such administratrix promised to pay over to *A.* the amount of the dividends when received:" held, that the consideration stated was insufficient to support the promise. *Parker* v. *Baylis et Ux. H.* 40 *G.* 3.

2 *B.* & *P. page* 73

2. An agreement between parties to a suit in Chancery binding themselves, their executors and administrators, made an order of that Court and acted upon therein as such, may be the ground of an assumpsit at law. *Smith* v. *Whalley*, *T.* 41 *G.* 3. 2 *B.* & *P.* 482

3. A master is not liable upon an implied assumpsit to pay for medical attendance on a servant who has met with an accident in his service. *Wennall* v. *Adney*, *M.* 43 *G.* 3.

3 *B.* & *P.* 247

4. *A.* having a horse to sell agreed to let *B.* have him for 30 guineas, if he liked him, and that he should take him a month upon trial. *B.* accordingly took him, and kept him about a fortnight, and then told *A.* he liked the horse but not the price; and *A.* desired him if he did not like the price to return the horse; *B.* however kept him 10 days more, and then returned him: but *A.* refused to receive him, and brought an action on the contract for 30 guineas, the price of the horse: held, that he could not maintain such action. *Ellis* v. *Mortimer*, *E.* 45 *G.* 3.
1 N. R. *page* 257

ATTACHMENT,

See Abbitration, No. 1. Arrest, No. 1. Bail, i. 12. ii. 6. Costs, i. 2. 13. Execution, No. 1. Practice, i. 10. ii. 2. Prisoner, No. 5. Venditioni Exponas.

1. An attachment for the non-payment of a sum of money pursuant to an award, cannot issue before a personal demand has been made. *Brandon* v. *Brandon*, *E.* 39 *G.*
1 *B.* & *P.* 394

2. Even though the time and place for the payment of the money be specified in the award. *ibid. ibid.*

3. No rule for an attachment shall be absolute in the first instance. *Chaunt* v. *Smart*, *E.* 36 *G.* 3.
1 *B.* & *P.* 477

4. Except for non-payment of costs upon the prothonotary's allocatur. *ibid. ibid.*

ATTESTING WITNESSES,

See Evidence, i. 1. ii. 7. Will.

ATTORNEY,

See Bail, i. 5, 6. 24. Costs, i. 16. iv. 2, 3. Courts, No. 5, 6. Dower. Insolvent, No. 8. Notice of Action. Practice, v. 16. ix. 5. Pleading, v. 32.

1. The Court will not discharge an attorney on a common appearance, unless he shew he has practised within the space of a year. *Dyson* v. *Birch*, *One*, *&c.* *E.* 37 *G.* 3. (Vide et *Brooke* v. *Bryant*, 7 *Term Rep.* 25.) 1 *B.* & *P.* *page* 4

2. *Qu.* If he should not also state that he has had a certificate under 25 *G.* 3. *c.* 80. within that time? *ibid. ibid.*

3. One admitted an attorney of C. B. (unless an attorney of K. B. or solicitor of Chancery or Exchequer) must file his articles of clerkship with the secondary, together with affidavits of execution, due service and notices. *Reg. Gen. T.* 37 *G.* 3.
1 *B.* & *P.* 90

4. A Plaintiff may sue out execution by a different attorney from the attorney in the cause, without obtaining an order of Court for changing the attorney. *Tipping* v. *Johnson*, *H.* 41 *G.* 3. 2 *B.* & *P.* 357

5. A common informer may recover penalties against an attorney for not entering his certificate according to the provisions of 37 *G.* 3. *c.* 90. *s.* 26., though no power is expressly given to him by that statute; for the 25 *G.* 3. *c.* 80. which gives that power, and the 37 *G.* 3. *c.* 90. are in pari materia. *Davis* v. *Edmonson*, in error, *E.* 43 *G.* 3.
3 *B.* & *P.* 382

6. Negligence in the conduct of a cause cannot be set up as a defence to an action

action on the attorney's bill. At least unless it was negligence such as to deprive the Defendant of all possible benefit from the cause. *Templer, Gent. One, &c.* v. *M'Lachlan, H.* 46. *G.* 3.
2 N. R. *page* 136

7. *Quære.* Whether even in such a case it can be used as a defence?
ibid. ibid.

ATTORNEY'S BILL,

See ATTORNEY, No. 6, 7. EVIDENCE, ii. 1, 2. 15, 16. INTEREST OF MONEY, No. 2. PRACTICE, vii. 3.

1. Delivery of an attorney's bill at the compting house of his client, one month before the commencement of an action upon the bill, is not a good delivery within the 2 *G.* 2. *c.* 23. *Hill* v. *Humphreys, H.* 41 *G.* 3. 2 *B. & P.* 343

2. If an attorney introduce into his bill certain items connected with his professional capacity, though not immediately within the terms of the 2 *G.* 2. *c.* 23. and in an action upon the bill fail, because it was not delivered according to the direction of the statute he must fail altogether, and will not be allowed to recover for such items only. *ibid. ibid.*

3. *Qu.* Whether the same rule would not prevail, if such items were not at all connected with his professional capacity? *ibid. ibid.*

4. A *dedimus potestatem* charged in an attorney's bill is a sufficient item to enable the Court to refer the bill for taxation, though with this exception it be entirely for conveyancing. *Ex parte Prickett, E.* 45 *G.* 3. 1 N. R. 266

ATTORNMENT,

See EXECUTOR AND ADMINISTRATOR, No. 4.

AVERAGE,

See INSURANCE, ii. 19.

AVOWANT,

See COSTS, i. 3, 4. 10. REPLEVIN, No. 1, 2.

AVOWRY,

See COSTS, i. 3, 4. PLEADING, iv. 6. 9. v. 19. 26. viii. 2.

AUCTION,

See FRAUDS, STATUTE OF, No. 2.

AUDITA QUERELA,

See BANKRUPT, ii. 5.

The Court will always give relief in a summary way, where a party would be entitled to it, on an *audita querela. Lister, one, &c.* v. *Mundell, E.* 39 *G.* 3.
1 *B. & P. page* 427

AUTHORITY,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 12. EXECUTORS AND ADMINISTRATORS, No. 5. OFFICER. RATE, No. 4.

1. If a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. *Grindley and Another* v. *Barker and Others, E.* 38 *G.* 3.
1 *B. & P.* 229

2. The Crown by letters patent granted to the master and wardens of the corporation of bakers (there being four wardens) by themselves and their

their deputy or deputies full power to overlook and correct the trade of baking; held, that the master and one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of the persons to whom the power was given; and if they acted as deputies, they were bound to shew that they were appointed by the majority. *Cook* v. *Loveland*, *M.* 40 *G.* 3.
2 *B.* & *P. page* 31

3. *Qu.* Whether an authority to enter the house of a person of a particular trade be incident to an authority given by charter to overlook and correct that trade? *ibid.* 33

4. Also whether the Crown have power to grant such authority? *ib.*

AWARD,

See ARBITRATION.

B.

BAIL,

See AFFIDAVIT, No. 2. AGREEMENT, No. 10. ALIEN. AMENDMENT, No. 2, 3, 4. 6. 10, 11. ATTORNEY, No. 1, 2. BANKRUPT, ii. 9. COSTS, i. 13. 15. 17. ESCAPE, No. 3, 4. ESTOPPEL, No. 2. FOREIGN LAWS. LUNATIC, No. 1. PLEADING, iii. 8. 10. iv. 2. PRACTICE, i. 6. 8. ii. iii. 25, 26. 27, 28. x. 2. VARIANCE, No. 3, 4. 12. 14.

I. *Of the Arrest and the Bail.*
II. *Proceedings against the Bail or the Sheriff.*
III. *Surrender of the Principal.*
IV. *Discharge by other Means.*
V. *Writ of Error.*

I. *Of the Arrest and the Bail,*

See AFFIDAVIT TO HOLD TO BAIL. BARON AND FEME.

1. The Court will not discharge a Defendant on a common appearance under the 34 *G.* 3. *c* 9. *s.* 7. on the ground of the Plaintiff's residence in *Holland*. *Pieters and Another* v. *Luytjes*, *E.* 37 *G.* 3.
1 *B.* & *P. page* 1

2. A *Frenchwoman* and her husband came over to *England*, the husband gives her a power of attorney to transact his business, and goes to *Hamburgh*, she cohabits with another man, and trades on her own account with the Plaintiff, by whom she is arrested; under these circumstances the Court will not discharge her on a common appearance, on the ground of her coverture, although the Plaintiff appear to have been acquainted with it. *De Gaillon* v. *V. H. L'Aigle*, *E.* 37 *G.* 3. 1 *B.* & *P.* 8

3. It is no objection to bail that they are indemnified. *Neat* v. *Allen*, *E.* 37 *G.* 3. 1 *B.* & *P.* 21

4. Where bail are opposed and rejected, and the Defendant is surrendered on the next day, he may justify new bail without paying the costs of the former opposition. *Holward* v. *Andrè*, *E.* 37 *G.* 3.
1 *B.* & *P.* 32

5. Bail

5. Bail are not permitted to justify who have been indemnified by the Defendant's attorney. *Reg. Gen. H.* 37 *G.* 3. 1 *B. & P. page* 103. *n.*

6. The Court rejected bail who had received a verbal promise of indemnity from the Defendant's attorney, but gave time to put in fresh bail. *Greensill* v. *Hopley, M.* 38 *G.* 3. 1 *B. & P.* 103

7. Where bail in *C. B.* is taken under a Judge's order, each of the bail is liable to double the sum ordered, as well as double the sum sworn to, when taken by affidavit. *Dahl* v. *Johnson, H.* 38 *G.* 3. 1 *B. & P.* 205

8. The Court will not permit a Defendant to justify bail after an action for an escape commenced against the sheriff, who has neglected to take a bail bond. *Webb* v. *Matthew, E.* 38 *G.* 3. 1 *B. & P.* 225

9. If a Defendant be arrested by process of *K. B.* and removed by habeas corpus to *C. B.* he may put in and justify bail in either court. *Knowlys and Another* v. *Reading, T.* 38 *G.* 3. 1 *B. & P.* 311

10. Bail were allowed to justify after the rule on the sheriff to bring in the body had expired, on payment of the costs of the opposition. *Weddall* v. *Berger, M.* 39 *G.* 3. 1 *B. & P.* 325

11. If a man carry on business at a lodging in one place, and keep a house at another, notice of bail describing him as of the former place is sufficient. *ibid. ibid.*

12. The Court allowed the Defendant to justify bail after an attachment had issued against the sheriff, but gave leave to the Plaintiff to oppose them without prejudice. *Williams* v. *Waterfield, M.* 39 *G.* 3. 1 *B. & P. page* 334

13. Where bail are regularly put in and excepted to, the Defendant need not describe them in his notice of justification. *England* v. *Kerwan, M.* 39 *G.* 3. 1 *B. & P.* 335

14. The Court will not discharge a defendant on a common appearance ou the ground of infancy. *Maddox* v. *Eden, E.* 36 *G.* 3. 1 *B. & P.* 480

15. A Defendant shall not enter into the recognizance of bail. *Reg. Gen. E.* 36 *G.* 3. 1 *B. & P.* 530

16. But each of his bail shall bind himself in double the sum sworn to. *ibid. ibid.*

17. Bail may justify in court though they did not actually become bail before the notice of justification was delivered. *Reg. Gen. M.* 37 *G.* 3. 1 *B. & P.* 660

18. In the Common Pleas, two days notice of justification must be given whether the bail originally put in, or added bail be brought up. *Nation* v. *Barrett, M.* 40 *G.* 3. 2 *B. & P.* 30

19. *Secus* in *K. B.* if the bail have been before put in and excepted to. *Wright* v. *Ley, H.* 15 *G.* 3. *B. R. in notis.* 2 *B. & P.* 31

20. It is not a sufficient ground for rejecting a person as bail that he is described to be "of *A.* in the county of *B.*, gaol-keeper." *Faulkner* v. *Wise, E.* 40 *G.* 3. 2 *B. & P.* 150

21. If on a bond debt, double the sum secured by the bond be the sum for which

which the bail bind themselves in the recognizance in error, it is sufficient, though a further sum be due for interest and costs, and nominal damages have been recovered. *Dixon* v. *Dixon*, *E.* 41 *G.* 3.
2 *B.* & *P. page* 443

22. Bail put in with the filazer of the county in which the Defendant is arrested on a *testatum capias*, may be treated as a nullity. *Clempson* v. *Knox*, *M.* 42 *G.* 3. 2 *B.* & *P.* 516

23. An indorser of a bill of exchange may be bail for the drawer, in an action against him on the same bill. *Harris* v. *Manley*, *M.* 42 *G.* 3.
2 *B.* & *P.* 526

24. An attorney's clerk, though not clerk to the Defendant's attorney, cannot become bail above. *Redit* v. *Broomhead*, *M.* 42 *G.* 3.
2 *B.* & *P.* 564

25. On justifying bail by affidavit, where the same persons are bail in more actions than one, each affidavit ought to state that the bail are worth double the amount of the debts in all the actions wherein they offer to become bail. *Field* v. *Wainewright*, *H.* 42 *G.* 3. 3 *B.* & *P.* 39

26. Defendant having given a bond conditioned for the payment of a sum of money if the sentence of a Vice-Admiralty Court should be affirmed on appeal, and the appeal having been dismissed for want of prosecution, Defendant was arrested and holden to bail; the appeal being restored upon petition, the action was suspended and the bail discharged; but being again dismissed, a new action on the bond was commenced, and the Defendant was again arrested and holden to bail; from this second arrest the Defendant applied to be discharged, but the Court rejected the application. *Woodmeston* v. *Scott*, *E.* 44 *G.* 3. 1 N. R. *page* 13

27. Plaintiff having recovered judgment and levied part under a *fi. fa.*, arrested the Defendant for the residue, in an action on the judgment, he not having been arrested in the original action; and the Court refused to discharge him. *Hesse* v. *Stevenson*, *M.* 45 *G.* 3. 1 N. R. 133

II. *Proceedings against the Bail, or the Sheriff,*

See AMENDMENT, No. 10.
COSTS, i. 16.

1. Where the rule to bring in the body expires on the last day in the term, the Plaintiff may at the rising of the Court move for an attachment for not bringing the body into Court, and such attachment may issue on the following day, provided bail shall not then be perfected, or the Defendant rendered in discharge thereof. *Reg. Gen. T.* 38 *G.* 3. 1 *B.* & *P.* 312

2. If bail be put in without any description, one of whom proves to be clerk to an attorney, and the other a person in a low situation, Plaintiff may take an assignment of the bail-bond. *Fenton* v. *Ruggles*, *M.* 39 *G.* 3. 1 *B.* & *P.* 356

3. If bail be brought up on the same day on which an attachment has been obtained against the sheriff, the Court will permit them to justify, and set aside the attachment on payment of costs. *Turner* v. *Bristow*, *M.* 40 *G.* 3.
2 *B.* & *P.* 38

4. If two attornies' clerks be put in as bail, the Plaintiff may treat such bail as a nullity, and take an assignment of the bail-bond. *Wallace* v. *Arrowsmith*, *M.* 40 *G.* 3. 2 *B.* & *P. page* 49

5. If the rule of allowance of bail be not served on the Plaintiff's attorney, he may take an assignment of the bail-bond, though he knows of the justification. *Holland* v. *White*, *M.* 41 *G.* 3. 2 *B.* & *P.* 341

6. Final judgment may be entered on a bail-bond without executing a writ of inquiry. *Moody* v. *Pheasant*, *E.* 41 *G.* 3. 2 *B.* & *P.* 446

7. If bail be put in with the filazer of the county in which the Defendant is arrested, on a *testatum capias*, the bail may be treated as a nullity, and an attachment issue. *Clempson* v. *Knox*, *M.* 42 *G.* 3. 2 *B.* & *P.* 516

8. But if the Plaintiff appear to have been aware that the bail were actually put in, though with the wrong filazer, the Court will relieve against the attachment. *ibid. ibid.*

9. When only two of three joint contractors are sued, the Court will not stay proceedings upon the bail-bond unless the Defendant undertake not to plead in abatement. *Govett* v. *Johnson*, *T.* 41 *G.* 3. 2 *B.* & *P.* 465

10. If proceedings be commenced upon a recognizance of bail immediately upon the return of the *ca. sa.*, the Court will not stay them, but upon payment of the costs, though the principal be surrendered within the four days allowed by the practice of the Court. *Abbott* v. *Rawley*, *H.* 42 *G.* 3. 3 *B.* & *P.* 13

11. The judgment in an original action, and the judgments in the actions against the bail, may be set aside upon one motion, and one affidavit entitled in the original action. *Winder* v. *Wood*, *E.* 42 *G.* 3. 3 *B.* & *P. page* 118

12. A rule for an attachment against the sheriff for not bringing in the body, having been obtained on the 19th of *November*, and the attachment not sued out and served on the sheriff until the 9th of *March* following, the Court held the sheriff discharged, and set the attachment aside. *Rex* v. *Perring*, *E.* 42 *G.* 3. 3 *B.* & *P.* 151

13. If a Plaintiff having taken an assignment of the bail-bond while the action is pending, proceed upon it after the cause is out of Court, the proceedings cannot be set aside for irregularity. *Pigott* v. *Truste*, *M.* 43 *G.* 3. 3 *B.* & *P.* 221

14. But the Court will stay such proceedings if it appear that the Plaintiff has been guilty of laches. *ibid. ibid.*

15. If *A.* being arrested by *B.* on process of the Common Pleas, give bail to the sheriff, and before the return of the writ being again arrested by *C.* is committed to the *Fleet* prison, after which *B.* takes an assignment of the bail-bond, and proceeds thereon, the Court will stay such proceedings, but will not make *B.* pay costs, for they will not try upon affidavit, whether he knew or not that *A.* was in custody, but will consider him ignorant of that fact unless notice of surrender has been regularly given. *Harding*

Harding v. *Hennem*, *M.* 43 *G.* 3. 3 *B.* & *P. page* 232

16. If bail above be put in and justified within four days from the ruling the sheriff to bring in the body, the Court will set aside all proceedings upon the bail-bond previous to the time of justification. *Wright* v. *Walker*, *M.* 44 *G.* 3. 3 *B.* & *P.* 564

17. Where a judgment against the principal is set aside upon condition that the bail-bond should stand as a security, the bail, if sued upon the bail-bond, are entitled to a rule to plead, and a demand of a plea before judgment can be signed against them. *Evans* v. *Surman*, *T.* 44 *G.* 3. 1 N. R. 63

18. If the affidavit upon which a motion for an attachment is founded, merely state that the officer of the sheriff was served with a copy of the rule to bring in the body, but do not add that the original rule was shewn to him, the Court will set aside the attachment. *Barnard* v. *Berger*, *M.* 45 *G.* 3. 1 N. R. 121

19. If the bail apply to stay proceedings upon the bail-bond or against the sheriff, they need not swear to merits, though a trial has been lost. *Hardisty* v. *Storer*, *M.* 45 *G.* 3. 1 N. R. 123

20. The Defendant has four days exclusive from the day of the exception, to justify bail: and if an attachment be obtained on the fourth day, the Court will set it aside without first calling on the Defendant to justify bail. *Maycock* v. *Solyman*, *M.* 45 *G.* 3. 1 N. R. 139

21. If the principal be actually in the custody of the sheriff at the time when the latter, at the instance of the Plaintiff, returns *non est inventus* to a *ca. sa.*, the Court will set aside such return, together with all subsequent proceedings against the bail, and order the money levied under an execution to be returned to them. *Forsythe* v. *Marriott*, *E.* 45 *G.* 3. 1 N. R. *page* 251

III. *Surrender of the Principal*, *See* LUNATIC, No. 3.

1. If the principal be surrendered within four days after the return of that writ in which there is an effectual proceeding, it is sufficient. Thus, if bail be served with process on his recognizance, and die before the *quarto die post*, and fresh process issue against his executors, they have until the *quarto die post* of the second writ to surrender the principal. *Meddowscroft*, *One*, *&c.* v. *Sutton and Another*, *T.* 37 *G.* 3. 1 *B.* & *P.* 61

2. If a Defendant surrender himself, it is a sufficient performance of the condition of the bail-bond, without putting in bail. *Maddocks and Another* v. *Bulcock*, *M.* 39 *G.* 3. 1 *B.* & *P.* 325

3. But he must give notice of such surrender. *ibid.*

4. Where bail has been rejected, the Defendant cannot surrender without putting in fresh bail. *Mills* v. *Head*, *M.* 45 *G.* 3. 1 N. R. 137 (*Contrà* in *B. R. Anon. May* 24. *E.* 40 *G.* 3. 1 N. R. 138. *n.*)

5. Bail may render the principal after having failed to justify on the day for which notice of justification has been given. And if they do

render and the Plaintiff take an assignment of the bail-bond, and proceed after notice of such render, his proceedings will be set aside without costs. *Seaver* v. *Spraggon*, *M.* 46 *G.* 3.
2 N. R. *page* 85

IV. *Discharge by other Means*, *See* BANKRUPT, ii. 3.

1. The Court will not discharge a Defendant on a common appearance, on the ground of his having obtained his certificate as a bankrupt, and of the debt being thereby barred, if the validity of the certificate is meant to be disputed. *Stacey* v. *Federici*, *E.* 41 *G.* 3.
2 *B.* & *P.* 390

2. If the acceptor of a bill of exchange not due become bankrupt, and the indorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, and the acceptor afterwards obtain his certificate, he will be discharged from the debt, and the Court will enter an *exoneretur* on the bail-piece in an action against him at the suit of the indorser. *Joseph* v. *Orme*, *E.* 46 *G.* 3.
2 N. R. 180

3. If an action be commenced against a bankrupt after the commission for work done before the bankruptcy, and the bankrupt afterwards obtain his certificate, the Defendant is discharged from the costs as well as the debt, and the Court will enter an *exoneretur* on the bail-piece. *Willett* v. *Pringle*, *T.* 46 *G.* 3. 2 N. R. 190

4. One of two Defendants having been holden to bail in *Trinity* term, the Plaintiff proceeded to outlawry against the other, and delivered a declaration against the former on the first day of *Easter* term, not having obtained a rule for time to declare: held that the cause was out of Court, and the bail entitled to an *exoneretur*. *Sykes* v. *Bawens and Another*, *E.* 47 *G.* 3. 2 N. R. *p.* 404

V. *Writ of Error.*

1. It is unnecessary to give bail in error on a judgment in debt, unless it appear that the action was brought on a specific contract. *Ablett* v. *Ellis*, *E.* 38 *G.* 3. 1 *B.* & *P.* 249

2. If a Defendant in error (the Plaintiff in the action) upon judgment being affirmed, take in execution the body of the Plaintiff in error for the debt, damages, and costs in error, he does not thereby discharge the bail in error, but may sue them upon their recognizance. *Perkins* v. *Pettit*, *E.* 41 *G.* 3.
2 *B.* & *P.* 410

3. A recognizance entered into by the bail in error without the principal is good. *Dixon* v. *Dixon*, *E.* 41 *G.* 3. 2 *B.* & *P.* 443

4. On the *quarto die post* of the return of the *ca. sa.* against the principal, the bail are fixed; and if after that time, they apply to stay proceedings against themselves pending a writ of error, the Court will not grant the application, unless they undertake to pay not only the condemnation money, but also the costs of the action against themselves, the costs of the application, and, where there is no bail in error, the costs of the proceedings in error. *Copous* v. *Blyton*, *T.* 44 *G.* 3. 1 N. R. 67

BAIL-BOND,
See AMENDMENT, No. 3. BAIL, i. 8. ii. iii. 2. ESCAPE, No. 3, 4. LUNATIC, No. 3. PLEADING, vii. 1. PRACTICE, i. 8. vii. 6, 7.

BAILMENT,
See CARRIER.

BAIL-PIECE.
The Court will give leave to amend a misnomer in the bail-piece. *Anderson* v. *Noah*, *E.* 37 *G.* 3. 1 *B.* & *P. page* 31

BAKER,
See AUTHORITY, 2, 3, 4.

BANK,
See EMBEZZLEMENT.

BANK ACT,
See AFFIDAVIT TO HOLD TO BAIL.

BANKER,
See CONSIGNMENT. PARTNERS, No. 1, 2. BILLS OF EXCHANGE, &c. No. 3. 16. 18.

BANKER'S CHECK,
See STAMPS, No. 4. 6.

BANK NOTES,
See AFFIDAVIT TO HOLD TO BAIL. EVIDENCE, ii. 30. FORGERY. TENDER, No. 2.

BANKRUPT,
See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 3. COMPOSITION, DEED OF. COSTS, iii. 4. COURTS, No. 1. INSOLVENT, No. 14. JUDGMENT, No. 1. LIEN, No. 1. 8, 9. PARTNERS, No. 1, 2. PLEADING, iii. 8. 10. iv. 2, 3. PRISONER, No. 2, 3. VENUE, No. 11.

I. *Of the Bankruptcy and Commission.*
II. *Of the Bankrupt's Rights and Duties.*
III. *Of the Bankrupt's Estate.*

I. *Of the Bankruptcy and Commission.*

1. It is no objection to a commission of bankruptcy that it was sued out with intent to defeat a previous execution, if no collusion appear on the part of the bankrupt. *Menham, Assignee*, &c. v. *Edmonson*, *H.* 39 *G.* 3. 1 *B.* & *P. page* 369

2. A commission of bankrupt founded on the petition of *A.*, a *British* subject resident in *England*, for a debt due to himself and his partners *B.* and *C.*, also *British* subjects, but resident and carrying on trade in an enemy's country, cannot be supported. *M'Connell* v. *Hector*, *E.* 42 *G.* 3. 3 *B.* & *P.* 113

3. A trader having a counting-house in town, and a dwelling-house in the country, left the former, (to which he never returned,) taking his books with him, and slept at his dwelling-house a few nights, when he finally left that also: held, that having quitted his counting-house without the *animus revertendi*, he began to absent himself from that day, within the meaning of the 13 *Eliz. c.* 7. *s.* 1. and thereby committed an act of bankruptcy. *Judine* v. *Da Cosseh*, *E.* 45 *G.* 3. 1 N. R. 234

4. The debt of a creditor, who has joined in a petition to supersede a prior

prior commission, and proved his debt under a second commission, coupled with an act of bankruptcy prior to that on which the second commission is founded, may be set up to defeat such second commission by a Defendant in an action at the suit of the assignees under the commission. *Beardmore* v. *Shaw*, *E.* 45 *G.* 3. 1 N. R. *page* 263

5. A farmer, who occasionally buys hay, corn, horses, &c. with a view to sell again for profit, does not thereby make himself a trader within the bankrupt laws. *Stewart, Assignee*, &c. v. *Ball*, *M.* 46 *G.* 3. 2 N. R. 78

6. A commission of bankrupt sued out upon the affidavits of four petitioning creditors, whose debts do not appear upon the face of those affidavits to amount to 200*l.*, is not void, the provision in the act 5 *G.* 2. *c.* 30. *s.* 23. respecting such affidavits being directory only, and not conditional. *Hill, Assignee*, &c. v. *Heale and Others*, *T.* 46 *G.* 3. 2 N. R. 196

II. *Of the Bankrupt's Rights and Duties*,

See BAIL, iv. 1, 2, 3.

1. If an order for the delivery of goods in the hands of a third person be given to an uncertificated bankrupt in payment of a debt accrued subsequent to his bankruptcy, he may maintain trover for them. *Fowler* v. *Down*, *E.* 37 *G.* 3. 1 *B.* & *P.* 44

2. If one of the creditors, though without the privity of the bankrupt, be induced by money to sign the certificate, it is void. *Holland* v. *Palmer*, *M.* 38 *G.* 3. 1 *B.* & *P. page* 95

3. The Court will not order a common appearance to be entered on the ground of the Plaintiff having proved his debt, and been chosen assignee under a commission of bankrupt issued against the Defendant. *Hill* v. *Reeves*, *E.* 39 *G.* 3. 1 *B.* & *P.* 424

4. If a *fi. fa.* issued against a bankrupt before certificate obtained be not executed till after, the Court will order the goods to be restored, even though he has not pleaded his certificate, according to 5 *G.* 2. *c.* 30. *s.* 7. *Lister, One*, &c. v. *Mundell*, *E.* 39 *G.* 3. 1 *B.* & *P.* 427

5. For the Court will always give that relief in a summary way, which might be obtained by *auditâ querelâ*. *ibid. ibid.*

6. But if any thing be alleged to invalidate the effect of the certificate, the Court will direct a trial on the plea of bankruptcy. *ibid. ibid.*

7. An action against a bankrupt who has obtained his certificate under a second commission, on a cause of action accruing previous to his second bankruptcy, may be maintained before a dividend has been made, or the period for making it allowed by the 5 *G.* 2. *c.* 30. *s.* 37. is elapsed, if evidence be adduced to shew that it is not probable from the state of the effects in the hands of the assignees that the bankrupt will be able to pay 15*s.* in the pound. *Jelfs* v. *Ballard*, *T.* 39 *G.* 3. 1 *B.* & *P.* 467

8. A debt accrued subsequent to an act of bankruptcy, but previous to the issuing of the commission, is not

not barred by the certificate. *Bamford* v. *Burrell*, *M.* 40 *G.* 3. 2 *B.* & *P. page* 1

9. *A.* being arrested, *B.* became bail for him to the sheriff, and judgment was obtained against *B.* upon the bail-bond, which was afterwards non-prossed; upon this the debt and costs were levied on *B.* by *fi. fa.*; after which *A.* obtained his certificate: held, that *B.* was not barred by the certificate from recovering from *A.* the amount of the debt and costs levied by the *fi. fa.* *Goddard* v. *Vanderheyden*, *M.* 12 *G.* 3. *in notis.* 2 *B.* & *P.* 8

10. The Court will not discharge a Defendant out of custody on a common appearance, on the ground of a commission of bankruptcy having been sued out against him by the Plaintiff as petitioning creditor, upon the same debt as that on which the arrest is founded. *Percy* v. *Powell*, *H.* 42 *G.* 3. 3 *B.* & *P.* 6

11. If the acceptor of a bill of Exchange not due become bankrupt, and the indorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, he may prove the amount under the commission; and if the acceptor afterwards obtain his certificate, he will be discharged from the debt. *Joseph* v. *Orme*, *E.* 46 *G.* 3. 2 N. R. 180

12. If an action be commenced against a bankrupt, after the commission, for work done before the bankruptcy, and the bankrupt afterwards obtain his certificate, the Defendant is discharged from the costs as well as the debt. *Willett* v. *Pringle*, *T.* 46 *G.* 3. 2 N. R. *page* 190

13. Where a verdict is recovered against a bankrupt after the bankruptcy in an action brought before, the costs are not proveable under the commission. *Ex parte Hill.* Sittings in *Lincoln's-Inn Hall* before *M. T.* 3d *Nov.* 1802, before Lord *Eldon*, Chancellor. 2 N. R. 191. *in notis.*

III. *Of the Bankrupt's Estate.*

1. If the furniture of a coffee-house be taken in execution by a creditor, and without being removed be let by him to the keeper of the coffee-house, who becomes bankrupt while in possession of it, the assignees may seize it under the 21 *Jac.* 1. *c.* 19. *s.* 11. *Lingham* v. *Biggs and Another*, *T.* 37 *G.* 3. 1 *B.* & *P.* 82

2. If a man be the reputed owner of goods, and appear to have the order and disposition of them, he must be understood to have taken upon himself "the sale, order, and disposition," within the meaning of the 21 *Jac.* 1. *c.* 19. *s.* 11. *ibid.* 87

3. Possession of chattels with nothing to oppose it, is always evidence of ownership; but such evidence as may be opposed. *ibid.* 88

4. *A.* as dyer having purchased a plant of *B.*, and being unable to pay the purchase-money, re-sold it to *B.*, who never took actual possession, but demised it to him for three years; during that time *A.* became bankrupt, and the assignees having seized the plant in his possession under the 21 *Jac.* 1., it was held a good

good defence to an action of trover brought against them by *B.* *Bryson* v. *Wylie*, *H.* 24 *G.* 3. *B. R.* 1 *B.* & *P. page* 83 *n.*

5. If a Plaintiff become bankrupt after a nonsuit at Nisi Prius, and before the judgment of nonsuit, the costs of the nonsuit are a debt proveable under the commission. *Watts* v. *Hart*, *M.* 38 *G.* 3. 1 *B.* & *P.* 134

6. If a creditor accompany the sheriff's officer in levying an execution which is afterwards avoided by a commission of bankruptcy, trover may be maintained against the former by the assignee, though he has never received either the goods or their value from the sheriff. *Menham, Assignee, &c.* v. *Edmonson*, *H.* 39 *G.* 3. 1 *B.* & *P.* 369

7. The acceptor of a bill of Exchange, two days before the expiration of the time for which the bill was originally drawn, called upon the indorser, and informed him privately that he was insolvent; the indorser insisted upon being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce; whereupon the acceptor paid it, and four days after became bankrupt: it also appeared that the bill had been altered so as to make it fall due before this transaction, but without the Defendant's knowledge: held, that this was sufficient proof of a fraudulent preference to defeat the payment of the bill. *Singleton* v. *Butler*, *M.* 41 *G.* 3. 2 *B.* & *P.* 283

8. Payment to a creditor under an arrest after a secret act of bankruptcy, is protected by 19 *G.* 2. *c.* 32. as a payment "in the usual and ordinary course of trade and dealing." *Cox* v. *Morgan*, *E.* 41 *G.* 3. 2 *B.* & *P. page* 398 S. P. *Holmes* v. *Wennington*, *Scacc. T.* 30 *G.* 3. 399 *n.*

9. If a debtor at the instance of his creditor, give goods out of his shop in part-payment of a bond not then due, and shortly afterwards become bankrupt, the mere circumstance of the bond not being due will not alone vitiate the part-payment on the ground of fraudulent preference. *Hartshorne* v. *Slodden*, *M.* 42 *G.* 3. 2 *B.* & *P.* 582

10. Property in which a bankrupt has only a trust estate, does not pass to the assignees under the assignment; therefore the *cestuy que trust* cannot bring any action respecting such property in their names, but ought to bring it in the name of the bankrupt. *Carpenter* v. *Marnell*, *H.* 42 *G.* 3. 3 *B.* & *P.* 40

11. A trader subsequent to an act of bankruptcy, being arrested and detained in prison at the suit of several creditors, sent for all his creditors but one, and paid their debts in full; but no other circumstance occurred from which it could be presumed that they knew of his bankruptcy or insolvency: held, that such payments were not protected by the 19 *G.* 2. *c.* 32. *Southey* v. *Butler*, *M.* 43 *G.* 3. 3 *B.* & *P.* 237

12. *A.* and *B.* being partners in trade, *A.* committed an act of bankruptcy, a few

a few days after which *B.* also committed an act of bankruptcy, and between the two acts of bankruptcy a clerk of the house paid to *C.* a creditor of the house at his request 558*l.*, and after both acts of bankruptcy 5*l.* more. The assignees under a joint commission against *A.* and *B.* brought an action against *C.* to recover those sums of money, and declared first for money had and received to the use of *A.* and *B.* before they became bankrupts; secondly, for money had and received to their own use as assignees of *A.* and *B.* after the bankruptcy of *A.* and *B.*; and, thirdly, upon an account stated with them as such assignees; held, that under this declaration the assignees were only entitled to recover the 5*l.* paid after the bankruptcy of both partners. *Smith* v. *Goddard*, *T.* 43 *G.* 3. 3 *B.* & *P. page* 465

13. *Semb.* That if they had declared for money had and received to their use as assignees of *A.*, they might have recovered one moiety of the 558*l.* paid between the two acts of bankruptcy. *ibid. ibid.*

14. If the assignees of an uncertificated bankrupt in their own names execute a deed with other creditors, whereby they, and all the creditors who may sign the said deed, release the bankrupt from all actions, suits, claims, and demands against him or his estate, and such deed be not signed by all the creditors of the bankrupt, the assignees are not barred from claiming as assignees the benefit of a patent right afterwards obtained by the bankrupt. *Hesse* v. *Stevenson*, *M.* 44 *G.* 3.
3 *B.* & *P. page* 565

15. A patent right for the exclusive exercise of an invention obtained from the Crown by an uncertificated bankrupt is affected by the previous assignment of the commissioners, and vests in the assignees. *ibid. ibid.*

16. An act of parliament empowering such bankrupt patentee, his executors, administrators, and assigns, to assign the right to a greater number of persons than allowed by the letters patent, and declared to be a public act, does not enable either the bankrupt or his assigns to make a better title than they could before the act. *ibid. ibid.*

17. If the printer and publisher of a newspaper assign his interest therein to a creditor as a security, but continue to print and publish as before, and no affidavit of the change of interest be delivered to the commissioners of stamps, and the printer become bankrupt, the right to the paper will pass to his assignees, under the assignment of the commissioners. *Longman and Another* v. *Tripp*, *M.* 46 *G.* 3.
2 N. R. 67

BANKRUPTCY, PLEA OF,

See PLEADING, iii. 8. 10. PRACTICE, iii. 17.

BARON AND FEME,

See ARBITRATION, No. 10. BAIL, i. 2. FINE, No. 7. PLEADING, ii. 5. 12. 16. v. 6. POWER.

1. Defendant's wife having committed adultery, he left her in his house with two children bearing his name, but

but without making any provision for her in consequence of the separation; she continued in a state of adultery: held that the husband should be liable for the necessaries furnished to her unless it appeared that the Plaintiff knew or ought to have known the circumstances under which she was living. *Norton* v. *Fazan*, *E.* 38 *G.* 3.
1 *B.* & *P. page* 226

2. It seems that a woman living apart from her husband in a state of adultery, is liable on her own contracts, though she has no separate maintenance. *Cox* v. *Kitchen*, *M.* 39 *G.* 3. 1 *B.* & *P.* 338

3. If the husband (being an alien, see *Farrer* v. *Lady Granard*, 1 N. R. 80.) reside abroad, and the wife trade and obtain credit in this country as a feme sole, she is liable for her own debts. *De Gaillon* v. *L'Aigle*, *M.* 39 *G.* 3. 1 *B.* & *P.* 357

4. A feme covert sole trader in the city of *London*, is not liable to be sued as such in the courts of *Westminster*. *Beard and Wife* v. *Webb* in error, *H.* 40 *G.* 3. 2 *B.* & *P.* 93

5. Though the custom of the city of *London* be stated on the record.
ibid. ibid.

6. And even in the city courts the husband should be joined for conformity. *ibid. ibid.*

7. An *Englishman* employed in the service of the *British* government, residing in a foreign country, and having lands there, upon the cessation of his employment in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself; held that the wife, not having represented herself as a feme sole, was not liable to be sued as such. *Marsh* v. *Hutchinson*, *T.* 40 *G.* 3.
2 *B.* & *P. page* 226

8. The Court refused to set aside, upon summary application, a judgment entered upon a warrant of attorney, by a feme covert. *Maclean* v. *Douglass*, *E.* 42 *G.* 3.
3 *B.* & *P.* 128

9. If a feme covert be taken in execution under a warrant of attorney given by her, as a feme sole, the Court will not discharge her on a summary application. *Wilkins* v. *Wetherill and Coutts*, *M.* 43 *G.* 3. 3 *B.* & *P.* 220

10. The Court will discharge a feme covert Defendant upon a common appearance, though she contracted the debt as a feme sole, and was entrusted by the Plaintiff, as such, unless she represented herself to be single. *Collins* v. *Rowed*, *T.* 44 *G.* 3. 1 N. R. 54

11. To a plea of coverture the Plaintiff replied that the Defendant's husband "lived and resided in parts beyond the seas, viz. in *Ireland*; and that the Defendant lived in this kingdom separate and apart from her husband, as a single woman; and as such single woman promised," &c. Held bad upon general demurrer. *Farrer* v. *Lady Granard*, *T.* 44 *G.* 3. 1 N. R. 80

12. In an action of debt on a bond by the trustees of the Defendant's wife, to enforce payment of an annuity secured to her, the Court refused to allow the Defendant to withdraw the general issue and plead, 1st, that the defendant's wife had committed

mitted adultery, and was living in that state; and, 2dly, that she had committed adultery at the time when the bond was executed in her favour, though the Defendant was ignorant thereof, being of opinion that such pleas, if pleaded, would not have been a good defence to the action. *Field* v. *Serres*, *M.* 45 *G.* 3. 1 N. R. *page* 121

13. If husband and wife separate by deed, and the former covenant with *A.* her sister, to pay to his wife, or such person as she should appoint, a certain weekly allowance, during their separation, and the wife afterwards live with *A.* and is by her supplied with necessaries, and the husband fails to pay the stipulated allowance to his wife, *A.* may maintain an indebitatus assumpsit against the husband for such necessaries. *Nurse* v. *Craig*, *H.* 46 *G.* 3. 2 N. R. 148.

14. The Court refused to discharge a Defendant on the ground of coverture, she being a foreigner, and her husband abroad, though she was not separated from him by deed, had no separate maintenance, nor had ever represented herself as a single woman. *Burfield* v. *Duchesse de Pienne*, *H.* 47 *G.* 3. 2 N. R. 380

BASTARD.

The mother of an infant illegitimate child is entitled to the custody of the child, in preference to the father, though from his circumstances he may be better able to educate it. *Ex parte Ann Knce*, *M.* 45 *G.* 3. 1 N. R. 148

BEDFORD LEVEL,

See RATE, No. 4.

BENEFICE,

See INSOLVENT, No. 14. PLEADING, v. 14.

BILL,

See PLEADING, ii. 7.

BILL, DELIVERY OF,

See ATTORNEY'S BILL, No. 1. EVIDENCE, ii. 1.

BILL OF EXCEPTIONS,

See EJECTMENT, No. 5.

A bill of exceptions is no part of the record in the Court below, and therefore is not to be included in the taxation of costs there. *Gardner* v. *Baillie*, *E.* 37 *G.* 3. 1 *B.* & *P. page* 32

BILL OF LADING,

See CONSIGNMENT. PLEADING, iv. 7.

BILL OF PARTICULARS,

See EVIDENCE, ii. 17. PAYMENT OF MONEY INTO COURT, No. 2. PRACTICE, iii. v. 24.

An order for a bill of particulars does not suspend the time for pleading, and therefore Plaintiff may sign judgment immediately after delivering the particulars, if the time for pleading be then out. *Hiffermun* v. *Langelle*, *H.* 41 *G.* 3. 2 *B.* & *P.* 363

BILL OF SALE,

See FRAUDULENT CONVEYANCE.

BILLS OF EXCHANGE AND PROMISSORY NOTES,

See AFFIDAVIT TO HOLD TO BAIL, No. 16. 28. BAIL, i. 23. iv. 2. BANKRUPT, ii. 11. iii. 7. EVIDENCE, i. 2. ii. 34. INSOLVENT, No. 15. INTEREST OF MONEY, No. 4. MONEY HAD AND RECEIVED, No. 4. 7, 10. PARTNERS, No. 1, 2. PAYMENT, No. 2, 3. PLEADING,

PLEADING, iii. 11. iv. 10. v. 5. 16, 17. PRACTICE, v. 9. RELEASE, No. 3. STAMPS, No. 6, 7. VARIANCE, No. 1. 11, 12. USURY, No. 1. 6.

1. A note payable on demand with interest drawn by *A.* in favour of *B*,. as a security for a debt, was by him indorsed to *C.* for the same purpose: after the indorsement it passed backwards and forwards between *B.* and *C.* several times, and previous to its being ultimately deposited with *C.* he received an intimation from *B.* not to negociate it, as the latter would want it when he settled accounts with *A.*; held that *C.* could not after a settlement of accounts between *A.* and *B.* without a re-delivery of the note, recover on it against *A.* *Roberts and Others, Assignees &c.* v. *Eden*, E. 39 G. 3. 1 *B.* & *B.p.* 398.

2. For it was deposited as a pledge, and therefore subject to the same equity as if remaining in the hands of the original payee. *ibid. ibid.*

3. If *A.* deposit bills indorsed in blank with *B.* his banker, to be by him received when due, and the latter raise money upon the bills by pledging them with *C.* another banker, and afterwards become bankrupt; *A.* cannot maintain trover against *C.* for the bills. *Collins* v. *Martin*, H. 37 G. 3. 1 *B.* & *P.* 648

4. Notice of non-payment of a bill by the acceptor need not be given to the drawer, if the latter have no effects in the hands of the former; though the indorser have. *Walwyn* v. *St. Quinten*, H. 37 G 3. 1 *B.* & *P.* 652

5. If the holder after protest for non-payment and notice to the drawer, forbear to sue the acceptor, the drawer is not thereby discharged. 1 *B.* & *P. page* 652

6. So after protest only, if the drawer be not entitled to notice. *ibid. ibid.*

7. *Secus*, before protest, or if the holder take security from the acceptor after protest. *ibid. ibid.*

8. If the holder accept part-payment of the indorser, he may still recover the residue against the drawer; if not the whole. *ibid. ibid.*

9. If the indorsee of a bill, having sued the acceptor to judgment, and taken out execution, receive of him a sum of money in part-payment, and take his security for the remainder, with the exception of a nominal sum only, he is thereby precluded from afterwards suing the indorser. *English* v. *Darley*, H. 40 G. 3. 2 *B.* & *P.* 61

10. Debt lies by the payee against the maker of a promissory note expressed to be for value received. *Bishop* v. *Young*, H. 40 G. 3. 2 *B.* & *P.* 78

11. An action will not lie on a promissory note given in payment of a wager on the amount of the hop duties. *Shirley* v. *Sankey*, E. 40 G. 3. 2 *B.* & *P.* 130

12. A warrant was directed to an officer of excise, by the commissioners, commanding him to apprehend a person convicted in several penalties, and take him to prison, and keep him there until the amount of the penalties was paid; the officer having arrested the party, discharged him on a promissory

missory note for the amount of the penalties payable at a future day; and the commissioners afterwards approved of his conduct; held that the discharge was a good consideration for the note, and that an action might be maintained thereon. *Pilkington* v. *Green*, *E.* 40 *G.* 3. 2 *B.* & *P. page* 151

13. *A.* with a view to accommodate *B.* lent him a bill, drawn by himself upon and accepted by *C.*, who had effects of *A.* in his hand: *B.* indorsed it to *D.* who indorsed it over; the day before the bill became due *B.* paid the amount to *A.*, who on hearing that *C.* had failed gave *B.* a check for the amount of the bill, and sent him with it to *D.* to enable him to pay the bill when due; four days after that time *A.* learning that payment had not been demanded, desired *D.* not to pay the bill, as no notice of non-payment had been given by the holder, and offered to indemnify him; notwithstanding this *D.* afterwards paid the bill: held that *D.* paid the bill in his own wrong. *Whitfield* v. *Savage*, *M.* 41 *G.* 3. 2 *B.* & *P.* 277

14. A note promising to pay "on the sale, or produce immediately when sold of the *White Hart Inn*, *St. Alban's*, *Herts*, and the goods, &c. value received," cannot be declared upon as a promissory note within the statute, though it be averred that before the action commenced the *White Hart Inn* and the goods were sold. *Hill* v. *Halford*, *Exchequer Chamber*, *E.* 41 *G.* 3. 2 *B.* & *P.* 413

15. If a bill of Exchange be made payable two months after date, and no date be expressed, the Court will intend it to be payable two months after the day on which it was made. *Hague* v. *French*, *T.* 42 *G.* 3. 3 *B.* & *P. page* 173

16. *A.* the agent in *America* of *B.* in *England*, drew a bill upon him, and indorsed it to *C.*, also residing in *America*, who indorsed it over. Before the bill became due, *A.* having reason to believe that *B.* would fail, lodged property belonging to *B.* in the hands of *C.* to answer the bill in case it should be returned, *C.* undertaking to restore the same whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to *A.*: held that *A.* was discharged. *Clegg and Another* v. *Cotton*, *M.* 43 *G.* 3. 3 *B.* & *P.* 239

17. *A.* deposited a sum of money at the banking house of *B.* in *Paris*, for which *B.* gave him his note, "payable in *Paris*, or at the choice of the bearer at the *Union Bank* in *Dover*, or at my usual residence in *London* according to the course of Exchange upon *Paris*;" after this note was given, the direct course of Exchange between *London* and *Paris* ceased altogether, having been, previous to its total cessation, extremely low; the note was at a subsequent period presented for acceptance and payment at the residence of *B.* in *London*, at which time there was a circuitous course of Exchange upon *Paris* by way of *Hamburgh*. Held that *A.* was entitled to recover upon the

the note according to such circuitous course of Exchange upon *Paris* at the time when the note was presented. *Pollard* v. *Sir Rob. Herries*, *H.* 43 *G.* 3.
3 *B.* & *P. page* 335

18. If the holder of a bill of Exchange, of which payment has been refused, inform the drawer of his intention to take security from the acceptor, and the drawer answer, that he may do as he likes, for that he (the drawer) is discharged for want of notice, and it appear that due notice had been given; the holder may sue the drawer, notwithstanding that he has taken security from the acceptor; for the drawer under such circumstances must be considered as having assented to the security being taken. *Clark* v. *Devlin*, *E.* 43 *G.* 3.
3 *B.* & *P.* 363

19. A bill indorsed in blank, and deposited by the holder with his bankers, became due on *Saturday*, and was presented for payment about two o'clock on that day. Payment being refused, the bill was noted and again presented between nine and ten in the evening by a notary. On *Monday* the bankers informed the holder that the bill was dishonoured, who on *Tuesday* about noon gave notice to the indorser. The holder lived at *Knightsbridge*, and the indorser in *Tottenham-Court-Road*. Held that this notice was sufficient to entitle the holder to recover against the indorser. *Haynes* v. *Birks*, *H.* 44 *G.* 3. 3 *B.* & *P.* 599

20. If *A.* indorse a bill, drawn in his favour and accepted, to *B.* in order that he may raise money for *A.* by negotiating it, and *B.* gives it to *C.* who puts it into the hands of *D.* without consideration two years after the bill is due, *A.* may recover back the bill from *D.* in trover. *Goggerley* v. *Cuthbert*, *H.* 46 *G.* 3.
2 N. R. *page* 170

BISHOP,

See PROHIBITION.

BOND,

See BAIL, i. 21. BARON AND FEME, No. 12. CONDITION. CONTRIBUTION. DISCONTINUANCE, No. 2. ESTOPPEL. EVIDENCE, i. 1. 6, 7. ii. 7, 8. EXECUTORS AND ADMINISTRATORS, No. 6. ILLEGAL CONTRACT, No. 3. PENALTY. PLEADING, i. 3. iii. 9. iv. 4. v. 24. 34. 37. REPLEVIN, No. 2. 4. RESIGNATION BOND. STAMPS, No. 9.

1. The Court will stay proceedings on a single bond on payment by the obligor of principal and costs, without interest. *Hogan* v. *Page*, *M.* 39 *G.* 3. 1 *B.* & *P.* 337

2. If the obligor of a bond after a notice of its being assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligee, the Court will set the plea aside. *Legh* v. *Legh*, *T.* 39 *G.* 3.
1 *B.* & *P.* 447

3. And they will not under these circumstances allow the obligor to plead payment of the bond.
ibid. ibid.

4. A bond taken by commissioners under an inclosure act, to indemnify them-

themselves against the expences of a suit brought to try the right to an allotment made by them, and in which they are, according to the directions of the act, made Defendants, is not void. *Iles* v. *Boxall, H.* 40 *G.* 3. 2 *B.* & *P. page* 89

5. Though there be a fund provided, out of which such expences may in some cases be satisfied. *ibid. ibid.*

6. At least if the commissioners doubt whether the case in question be one of those cases. *ibid. ibid.*

7. *A.* executed a bond as the joint and several bond of himself and *B.*, and signed it "*A.* and *B.*" having no authority from *B.* so to do: held, that the bond was good, as the several bond of *A. Elliot* v. *Davis, M.* 41 *G.* 3. 2 *B.* & *P.* 338

BRIBERY,

See TREATING.

BRIDGE,

See CERTIORARI.

Quære, Whether the same persons who are bound to repair a bridge, are also bound to widen it, if the exigencies of the public should require it? *The Inhabitants of the County of Cumberland* v. *The King in Error, E.* 43 *G.* 3. 3 *B.* & *P.* 354

BURGLARY,

See LARCENY.

Indictment for a burglary, laid in the first count to have been committed in the house of *M. R. B.*; in the 2d, of *J. B.*, and in the 3d of *B. N.* It appeared that the place where the robbery was committed, was the centre of a building having two wings; that in the centre building the business of *M. R. B.*, *J. B.*, *W. N.*, and several other persons was carried on; that in part of one of the wings was the dwelling of *M. R. B.*, and in the other part, that of *J. B.*, neither having any internal communication with the centre, except by a window in the dwelling of *J. B.*, which looked into a passage that ran the whole length of the centre, and that the other wing was occupied by *W. N.*, from which there was no communication with the centre. *Semb.* That the robbery did not amount in law to a burglary. *The King* v. *John Egginton and Others. T.* 41 *G.* 3. 2 *B.* & *P. page* 508

BYE-LAW,

See PLEADING, iv. 1.

A penalty of 20 shillings having been imposed by one of the bye-laws of the butchers' company on all persons selling meat on a *Sunday*, within their jurisdiction, it was declared by a subsequent clause, that if any offender should deny, refuse, or neglect to pay the penalty, he should be liable to an action of debt: held, that it was not necessary to prove a previous demand, in order to maintain such action, although averred in the declaration. *The Butchers' Company* v. *Bullock, E.* 43 *G.* 3. 3 *B.* & *P.* 434

C.

CANAL ACT,

See COSTS, i. 3.

CANDIDATE,

See DEFAMATION, No. 3. PLEADING, v. 25. TREATING.

CARRIER,

See CONSIGNOR AND CONSIGNEE. LIEN. PAYMENT OF MONEY INTO COURT, No. 1. PLEADING, ii. 15, 16.

If *A.* send goods by *B.*, who says "I will warrant they shall go safe," *B.* is liable for any damage sustained by the goods, notwithstanding *A.* send one of his own servants in *B.*'s cart to look after them. *Robinson* v. *Dunmore*, *E.* 41 *G.* 3. 2 *B.* & *P. page* 416

CERTIFICATE,

See ATTORNEY, No. 2. BANKRUPT, ii. iii. 14, 15, 16. COMMON INFORMER. COSTS, i. 14. PLEADING, iii. 10. v. 31.

CERTIORARI.

The 1 *Ann. c.* 18. *s.* 5. has not taken away from the Crown the power of removing by certiorari an indictment for not repairing a county bridge. *The Inhabitants of the County of Cumberland* v. *The King, in Error.* *E.* 43 *G.* 3. 3 *B.* & *P.* 354

CESTUY QUE TRUST,

See PLEADING, vi. 1.

CHARTER,

See AUTHORITY, No. 2.

CHARTER-PARTY,

See AGREEMENT, 4. PLEADING, ii. 15. SHIP, No. 4.

CLAIM,

See TOLL.

COALS,

See AGREEMENT, No. 8. COVENANT, No. 3.

COGNIZANCE,

See PRACTICE, iii. 19. REPLEVIN, No. 1, 2.

COGNOVIT,

See STAMPS, No. 1.

COIN,

See INDICTMENT, No. 5.

COLLECTOR,

See TAXES.

COLLEGES,

See LAND TAX.

COMMITMENT,

See EVIDENCE, ii. 23. 25, 26. HABEAS CORPUS, No. 1, 2.

COMMON,

See PLEADING, iv. 6. 9. v. 13.

1. If the lord of a manor plant trees on a common, the commoner has no right to abate them, though there be not a sufficiency of common left: his remedy

remedy is by action. *Kirby* v. *Sadgrove, in Error, E.* 37 *G.* 3. 1 *B. & P. page* 13

2. But if the lord so plant as to destroy the common, such an act would be considered as a nuisance, and the commoner might abate. *ibid. ibid.*

COMMON INFORMER,

See ATTORNEY, No. 6.

A common informer may recover penalties against a proctor for acting as such without having obtained and entered his certificate under 37 *G.* 3. *c.* 90. *Barnard* v. *Gostling, E.* 45 *G.* 3. 1 N. R. 245

COMMON RECOVERY,

See DOWER.

1. It is no objection to the passing a common recovery, that the order of the names of the vouchees in the *præcipe* at bar varies from that in the dedimus. *Lang* v. *Woodhouse, E.* 37 *G.* 3. 1 *B. & P.* 31

2. Nor that the warrants of attorney of the several vouchees are on separate pieces of parchment. *ib. ib.*

3. The Court will give leave to amend a mistake in the writ of entry in a common recovery. *Cross* v. *Pead, M.* 38 *G.* 3. 1 *B. & P.* 137

4. No common recovery or fine shall be suffered to pass unless the taking of the warrants of attorney be before one of the Justices or Barons of the Courts at *Westminster*, or one of the Serjeants at Law, unless an affidavit be filed stating that the commissioners taking the same, are to the best of the Defendant's information and belief, either barristers of five years' standing, or solicitors or attornies of some of the Courts at *Westminster*, the Judges of the Court of Session and Exchequer, or advocates and clerks to the signet of five years' standing in *Scotland. Reg. Gen. M.* 39 *G.* 3. 1 *B. & P. page* 362

5. The Court amended a recovery, by inserting a new parish in the writ of entry, upon an affidavit of the intention of the parties to include all their property within the county, and of the assent of all persons interested at the time of the amendment. *Wheeler* v. *Heseltine, M.* 42 *G.* 3. 2 *B. & P.* 560

6. A writ and the subsequent proceedings on a recovery, were amended by inserting the words, "all and all manner of tithes whatsoever yearly arising, &c. from and out of the said premises," on an affidavit setting out the vouchee's title to the tithes, and stating his intention to have passed all his interest in the premises, the word "hereditaments" being contained in the deed to lead the uses, and the recovery being of *Michaelmas* term, 39 *G.* 3. *Dowse* v. *Reeve, M.* 42 *G.* 3. 2 *B. & P.* 578

7. On the 23d *June* 12 *G.* 3. a recovery suffered on the 2d *October* 11 *G.* 1. of the manor or deanery of *Chester-le-Street*, with its members and appurtenances, 30 messuages, &c. and 400 acres of moor, was amended by inserting, in the writ of entry and subsequent proceedings, after the words "*quadraginta acras moræ*," the words "*ac etiam advocationem, presentationem, donationem, nominationem, liberam dispositionem et jus patronatus*

natus ecclesiæ de Chester-le-Street, *ac etiam advocationem, &c. de curatione de* Chester-le-Street," the word "hereditaments" being contained in the deed to lead the uses, and the intention to pass the advowson with the rest of the premises appearing, although the amendment was contested. *Milbanke* v. *Jolliffe*, Court of Pleas at *Durham*, 23d *June*, 12 *G.* 3. *in notis.* 2 *B. & P. page* 580

8. If the different vouchees in a recovery execute and acknowledge several warrants of attorney, though upon the same piece of parchment, the Court will not suffer the recovery to pass. *Jennings* v. *Street*, *E.* 43 *G.* 3., 3 *B. & P.* 361

9. The Court amended a recovery of the 17 *G.* 3. by inserting the word "tithes," the deed to lead the uses having conveyed all the hereditaments late of *C. C.* deceased, who had devised all his hereditaments at *M.* to the vouchee, and it appearing to have been lately discovered that the devisor was entitled to the tithes of *M. Corden, dem. Hall, tenant, and Colclough, vouchee*, *E.* 47 *G.* 3. 2 N. R. 431

COMPOSITION,

See FRAUDS, STATUTE OF, No. 7.

COMPOSITION, DEED OF.

The creditors of a bankrupt entered into a deed of composition to receive 8*s.* in the pound in full discharge of their debts, and agreed to release every thing beyond that to the bankrupt, and joined in a petition to the Chancellor to supersede the commission; one of the creditors having two distinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of 8*s.* in the pound on both debts, and then recovered on some of the bills: held, that the bankrupt was entitled to sue for the money so obtained on the bills in an action for money had and received. *Stock* v. *Mawson*, *T.* 38 *G.* 3. 1 *B. & P. page* 286

COMPOSITION OF PENAL ACTIONS,

See PENAL ACTIONS.

COMPOSITION, REAL,

See EVIDENCE, ii. 12. TITHES.

CONDITION,

See BOND. ESTOPPEL. PLEADING, i. 1. iii. 9. iv. 4. RESIGNATION BOND. STAMPS, No. 9.

1. If the condition of a bond be to render a person in execution who has once been discharged, it is void. *Da Costa* v. *Davis*, *E.* 38 *G.* 3. 1 *B. & P.* 242

2. If a condition be to do one of two things, and one become impossible, it is no excuse for not performing the other. *ibid. ibid.*

3. A bond was given to *A. B. C.*, &c. payable to them and their successors, as the governors of the society of musicians, conditioned to secure *J. H.*'s faithfully accounting with them and their successors, governors, &c. as their collector; afterwards the society was incorporated by letters patent, at which time *J. H.* had duly accounted for all monies collected by him; but, after the

the incorporation, received money, for which he did not account: held, that the obligor of the bond was not liable for such default of *J. H.* in an action on the bond. *Dance* v. *Girdler*, *E.* 44 *G.* 3.

1 N. R. *page* 34

4. *A.*, *B.* and *C.* entered into a bond as sureties for *D.* and *E.* The condition of which bond recited, that "*D.* was on such a day appointed collector of the church rate of the parish of *St. S. S.*, by virtue of which office he was empowered to collect and receive all such monies as were rated and assessed on the inhabitants by virtue of the said rate, and for which he was accountable to the wardens of the grand account, and bound the sureties for *D.*'s duly accounting for all monies collected or received by him on account of the above rate, as also on all and every other rate or rates, thereafter to be made and collected by him the said *D.*" Held, that the sureties were only answerable for *D.* on that single appointment, and not on his appointment in the ensuing year. *The Wardens of St. Saviour, Southwark*, v. *Bostock and Others*, *E.* 46 *G.* 3.

2 N. R. 175

5. The condition of a bond after reciting the grant of an annuity by the Prince of *W.* to *J. C.*, an assignment of the same to the obligee with the assent of the Prince, and an agreement that the obligor should give his bond as an additional security, was declared to be, that if the Prince or his treasurer, or any person for him, should pay the annuity quarterly to the obligee, the bond should be void. Held, that upon failure of payment the obligee was entitled to sue the obligor, without having first presented a particular of his demand to the Prince's treasurer, pursuant to 35 *G.* 3. *c.* 125. *s.* 7. *Sparkes* v. *O'Kelly*, *E.* 47 *G.* 3.

2 N. R. *page* 421

CONDITION PRECEDENT,
See PLEADING, v. 34, 35.

CONSIDERATION,
See ASSUMPSIT, No. 1. BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 12. ILLEGAL CONTRACT, No. 3.

CONSIGNMENT.

A. of *Liverpool*, wishing to draw on the banking-house of *B.* in *London* to a large amount, agreed among other securities given to consign goods to a mercantile house, consisting of the same partners as the banking-house, though under the firm of *B.* and *C.*: accordingly he remitted the invoice of a cargo, and the bill of lading indorsed in blank to *B.* and *C.*; but the cargo was prevented from leaving *Liverpool* by an embargo; *A.* then became bankrupt, being considerably indebted to *B.*, and the cargo was delivered to his assignees by the captain: held, that *B.* and *C.* might maintain trover for it against the captain. *Haille* v. *Smith in error*, *M.* 37 *G.* 3. 1 *B.* & *P.* 563

CONSIGNOR AND CONSIGNEE,
See INSURANCE, i. 14. LIEN.

1. Delivery of goods by the vendor on behalf of the vendee, to a carrier

rier not named by the vendee, is a delivery to the vendee. *Dutton* v. *Solomonson*, *M.* 44 *G.* 3.
3 *B.* & *P. page* 582

2. *A.* delivered goods under the value of 40*s.* to a carrier in *London*, pursuant to an order from *B.* who was resident in *Leicestershire*, and received the goods in the latter county: held, that no action for the goods could be maintained in the county court of *Leicestershire*, and that the Court of *C. B.* could not therefore stay proceedings in an action commenced in that court. *Harwood* v. *Lester*, *H.* 44 *G.* 3.
3 *B.* & *P.* 617

3. *A.* in *London* received an order from *B.* living in *Bristol*, to send goods to him by any conveyance which would reach *Bristol* (as *B.* lived only six miles from thence) informing *B.* when he sent them, that *B.* might know when to expect them. *A.* sent the goods to a wharf from whence vessels for *Bristol* sailed, and informed *B.* as he was told at the wharf, that the goods would come by the ship *Commerce;* in fact, the goods were not sent on board the *Commerce*, which happened to be fully laden, but sometime afterwards were sent by another vessel. *B.* after the arrival of the *Commerce* at *Bristol*, without the goods, made no further inquiry for them, and *A.* did not know till after he had required payment of the goods that they had been sent by another ship, which he then communicated to *B.*: held, that *B.* was liable for any loss of the goods. *Cooke* v. *Ludlow*, *H.* 46 *G.* 3. 2 N. R. 119

CONSOLIDATION RULE.

Where several causes are consolidated. if a writ of error be issued in the cause tried, and execution taken out for want of bail in error being duly put in, and the writs of error be issued in the other causes, and bail duly put in, execution in those causes is thereby stayed, for the consolidation rule only relates to the verdict. *Aylwin* v. *Favine*, *E.* 47 *G.* 3.
2 N. R. *page* 430

CONTRACT,

See ABATEMENT, No. 3. AGREEMENT. ASSUMPSIT, No. 4. COSTS, ii. 7. COVENANT. COURTS, No. 3. EVIDENCE, ii. 6. FRAUDS, STATUTE OF, No. 4. 7, 8. GAMING. GOODS SOLD AND DELIVERED, No. 2. ILLEGAL CONTRACT. MONEY HAD AND RECEIVED, No. 7. 12. PAYING MONEY INTO COURT, No. 5, 6, 7. PLEADING, ii. 1. v. 18. 28. SEAMAN'S WAGES, No. 6.

CONTRIBUTION.

1. It seems that one of several cosureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties. *Cowell* v. *Edwards*, *T.* 40 *G.* 3. 2 *B.* & *P.* 268

2. Even though the insolvency of the principal and the other sureties be not proved *ibid. ibid.*

3. If *A.*, *B.* and *C.* become bound as sureties for *D.* in three separate bonds,

bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds *Sir E. Deering* v. *The Earl of Winchelsea*, *Feb.* 8, 1787. 2 *B.* & *P. page* 270

CONVEYANCE,

See DEED. FRAUDULENT CONVEYANCE.

CONVICTION,

See HABEAS CORPUS, No. 2.

CONVOY,

See SHIP, No. 3.

COPYHOLD,

See COVENANT, No. 9. CUSTOM. EJECTMENT, No. 7. PLEADING, iii. 8.

1. If there be a custom within a manor for a lord to grant parcels of the waste, by copy of court roll, the premises granted in the above mode are well described as copyhold premises, though the date of the grant be modern. *Lord Northwick* v. *Stanway*, *H.* 43 *G.* 3. 3 *B.* & *P.* 346

2. If an assessment of a copyhold fine be entered in the Court rolls as of 100*l.* but that out of especial favour the lord remitted 40*l.* and thereby reduced it to 60*l.*, and the lord sue for the fine, and the jury finding the annual value of the premises 30*l.* give a verdict for 60*l.*, the lord cannot retain the verdict for the sum actually due, but must make a new assessment, the old assessment, notwithstanding the remitter being in law an assessment as of 100*l.* *Lord Northwick* v. *Stanway*, *H.* 43 *G.* 3. 3 *B.* & *P. page* 346

CORPORATION,

See CONDITION, No. 3. INSOLVENT, No. 17. MISNOMER, No. 1, 2, 3. PLEADING, ii. 4. iv. 1. TOLL.

By indenture between *A. B.* and *C.*, bailiffs, and *D. E.* and *F.*, aldermen, with the assent of the burgesses of the borough of *M.* of the one part, and *J. S.* of the other part; the said bailiffs, aldermen, and burgesses, demised lands to *J. S.* for years, to be holden of the said bailiffs, aldermen, and burgesses; and the deed was executed by *A. B.* and *C. D. E.* and *F.* but not sealed with the corporation seal; *J. S.* having paid rent to the bailiffs as chief officers of the borough, held that their servant might make cognizance for taking a distress under a demise by the corporation, notwithstanding a notice had been given by the alderman, (one of whom was a party to the indenture), to pay the rent to them; for the payment of rent to the bailiffs admitted a tenancy from year to year under the corporation. *Wood* v. *Tate*, *T.* 46 *G.* 3. 2 N. R. 247

COSTS,

See ATTORNEY'S BILL, No. 4. BAIL, i. 4. 10. ii. 10. 15. iv. 3. v. 4. BANKRUPT, ii. 9. 11, 12, 13. iii. 5. BILL OF EXCEPTIONS. COURTS, DISCONTINUANCE, No. 2. PAY-

ING MONEY INTO COURT, No. 9. PLEADING, v. 24. 34. PRACTICE, ii. 2. iii. 14. iv. 2. v. 22. viii. REPLEVIN, No. 3. 5.

I. *When payable by and to Persons in general.*
II. *When payable by and to particular Persons.*
III. *Staying Proceedings till Costs paid or security given.*
IV. *Set off.*

I. *When payable by and to Persons in general.*

1. The general term costs in a rule of reference to arbitration does not include the costs of that reference. *Bradley* v. *Tunstow*; *E.* 37 *G.* 3. 1 *B. & P. page* 34
2. If an arbitrator award among other things that each party shall pay a moiety of the costs of the arbitration, and making the submission a rule of Court; and one party in order to get the award out of the hands of the arbitrator pay the whole, he may have an attachment against the other party if he refuse to pay his moiety. *Hicks* v. *Richardson*, *M.* 38 *G.* 3. 1 *B. & P.* 93
3. A rent charged on the rates by a canal act, as a compensation for damage done to land, is not within the 11 *G.* 2. *c.* 19. *s.* 22. so as to entitle an avowant to double costs. *Leominster Canal Company* v. *Cowel and Another*, *H.* 38 *G.* 3. 1 *B. & P.* 213
4. Nor is any rent charge. *ibid. ibid.*
5. In the *C. B.* if a Plaintiff obtain judgment upon one of several counts in a declaration, he is entitled to the costs of the whole. *Spicer* v. *Teasdale*, *M.* 40 *G.* 3. 2 *B. & P. page* 49
6. In C. B. if the plaintiff proceed to trial after money paid into Court, and the verdict be against him, he is notwithstanding entitled to costs up to the time of the money being paid in. *Wilton* v. *Place*, *M.* 40 *G.* 3. 2 *B. & P.* 56
7. In an action on a policy of insurance, with a count for money had and received, if the Defendant pay no money into Court, but establish as a defence that the risk never commenced, if the Plaintiff obtain a verdict for the premium only, neither party is entitled to the costs of the special count, but the Plaintiff is entitled to the costs of the count on which he succeeds, and so much of the expences of the trial as were necessarily incurred by him in support of that count. *Penson* v. *Lee*, *M.* 41 *G.* 3. 2 *B. & P.* 330
8. (The Court of C. B. in the above case declared, that they had, since the case of *Spicer* v. *Teasdale*, determined to adopt the practice of the K. B. respecting costs in cases of this nature.) 2 *B. & P.* 334
9. If a Plaintiff in replevin plead several pleas in bar, upon which issues are joined, and some issues are found for the Plaintiff, and some for the Defendant, the latter is entitled to such costs of the trial as relate to the issues on which he succeeded, as well s to the costs of the pleadings. *Vollum* v. *Simpson*, *H.* 41 *G.* 3. 2 *B. & P.* 368.
10. If an avowant in replevin after trial and verdict for the Plaintiff obtain

obtain judgment *non obstante veredicto*, in consequence of the Plaintiff's pleas in bar being bad, he is not entitled to any costs on the pleadings, subsequent to the pleas in bar, because he should have demurred to them. *Da Costa* v. *Clarke*, *H.* 41 *G.* 3.

2 *B. & P. page* 376

11. Defendant having been arrested on a *capias*, returnable on the first return of the term, on the day before the essoin day took out a summons to stay proceedings upon payment of the debt and costs; on the essoin day Plaintiff filed a declaration *de bene esse*, and on the day after the essoin day Defendant obtained an order to stay proceedings: held that the Plaintiff was entitled to the costs of the declaration. *Faweett* v. *Christie*, *M.* 42 *G.* 3. 2 *B. & P.* 515

12. If a rule of Court for the examination of witnesses by commission express that the deposition of witnesses at *Hamburgh* and *Lubeck* are to be taken, and the commission is directed to persons at *Hamburgh*, the expences of bringing witnesses from *Lubeck* to *Hamburgh* ought to be allowed upon taxation. *Muller* v. *Hartshorne*, *M.* 44 *G.* 3. 3 *B. & P.* 556

13. Time for putting in bail expired on the 30th, Defendant on the 31st moved to justify, pursuant to a notice previously given. Held that the Plaintiff was entitled to the costs of preparing to move for an attachment. *Jarret* v. *Creasy*, *H.* 44 *G.* 3. 3 *B. & P.* 603

14. If a Plaintiff sue for assault, battery, and imprisonment, but only prove an imprisonment, and obtain one farthing damages, a certificate of the judge under the 43 *Eliz. c.* 6. will deprive him of costs. *Emmett* v. *Lyne*, *E.* 45 *G.* 3.

1 N. R. *page* 255

15. If a Defendant be holden to bail for a larger sum, and pay a lesser sum into Court, which the Plaintiff accepts, and proceeds no farther in the action; the Defendant may apply under the 43 *G.* 3. *c.* 46. *s.* 3. for costs. *Laidlaw* v. *Sir James Cockburn Bart*, *M.* 46 *G.* 3.

2 N. R. 76

16. If a Plaintiff collude with the Defendant's bail, and his attorney, to deprive the Plaintiff's attorney of his costs by settling a debt, and accepting a part payment without the intervention of the Plaintiff's attorney, the Court will not restrain the Plaintiff's attorney from proceeding against the bail, in order to recover such costs. *Swain* v. *Senate*, *H.* 46 *G.* 3. 2 N. R. 99

17. Plaintiff having obtained a verdict, the Court granted a new trial directing that the "costs of the former trial should abide the event of the new trial." On the second trial the verdict was for the Defendant. Held that the Defendant was only entitled to the costs of the second trial. *Chapman* v. *Partridge*, *H.* 47 *G.* 3.

2 N. R. 382

18. If a writ be returnable in the first return of the term, and the Defendant gave notice that the debt and costs will be paid before the appearance day, and accordingly tender the debt and costs of the writ before that day, the Plaintiff is not entitled

entitled to the costs of a declaration, delivered *de bene esse*. *Partington, One, &c.* v. *Williams, H.* 47 *G.* 3. 2 N. R. *page* 398

19. *Quære*, Whether he would be entitled to such costs if no notice had been given? *ibid. ibid.*

20. In an action for assault, battery, and false imprisonment, if the verdict be for one shilling, and the judge certify under 43 *Eliz. c.* 6. the Plaintiff will be deprived of his costs, though a battery was proved at the trial. *Wiffin* v. *Kincard, T.* 47 *G.* 3. 2 N. R. 471

II. *When payable by, and to particular Persons.*

1. A pauper as such can never pay costs. *Rice* v. *Brown, E.* 37 *G.* 3. 1 *B. & P.* 39

2. *Semble*, that he may receive them for the defaults of his opponent. *ibid. ibid.*

3. If he misbehaves himself the Court will dispauper him, and so make him liable to costs. *ibid. ibid.*

4. The Court set aside a judgment and warrant of attorney given to secure an annuity for a defect in the memorial without costs, because it was the case of an executor. *Dickenson, Executor, &c.* v. *Boyne, M.* 39 *G.* 3. 1 *B. & P.* 335

5. *A.* sued as executrix of *B.* on a policy effected by *B.* in his lifetime, in which he was jointly interested with *C.* and *D.* now living; *A.* being nonsuited, held that she was entitled to the privilege of an executrix to be exempt from costs. *Wilton, Executrix*, v. *Hamilton, T.* 39 *G.* 3. 1 *B. & P. page* 445

6. Covenant by the Plaintiff as administratrix on a breach subsequent to the death of her intestate, and judgment against her on demurrer. Held that she was not liable to costs. *Tattersall* v. *Groote, T.* 40 *G.* 3. 2 *B. & P.* 253

7. Plaintiff sued as administrator upon a contract made with his intestate, and assigned by the Plaintiff to *J. S.* for whose benefit the action was brought. It appearing that the contract had been annulled with the privity both of the Plaintiff and *J. S.* and that the former was indemnified by the latter, and a verdict being found for the Defendant, the Court made an order on the Plaintiff to pay the costs. *Comber* v. *Hardcastle, E.* 42 *G.* 3. 3 *B. & P.* 115

III. *Of staying Proceedings till Costs paid, or Security given.*

See Lunatic, No. 2. Practice, v. 18.

1. The Court will not stay proceedings till security is given for costs in an action by a foreign seaman serving on board an *English* ship. *Jacobs* v. *Stevenson, M.* 38 *G.* 3. 1 *B. & P.* 96

2. The Court will not compel a prisoner of war who sues for wages earned on board an *English* ship to give security for costs. *Muria* v. *Hall, T.* 40 *G.* 3. 2 *B. & P.* 236

3. Ejectment in *C. B.* and verdict for the Plaintiff, and costs paid by the Defendant,

Defendant, who then brought an ejectment in K. B. for the same premises and recovered, but was not paid his costs; and now a third ejectment being commenced here by the Plaintiff in the first ejectment, the Court stayed proceedings till payment of the costs of the second ejectment in K. B. *Doe* d. *Walker* v. *Stevenson*, *H.* 42 *G.* 3. 3 *B.* & *P. page* 22

4. A commission of bankrupt having issued against the Plaintiff who was going with his family to *New York*, upon the petition of the defendant, who was the only creditor, and had chosen himself sole assignee, and the Plaintiff having brought an action against the Defendant to try the commission, the Court refused to stay the proceedings till he should give security for the costs. *M'Cullock* v. *Robinson*, *M.* 47 *G.* 3. 2 N. R. 352

IV. *Set off.*

1. The costs of two actions between the same parties, though in two different courts, may be set off against each other. *Hall* v. *Ody*, *M.* 40 *G.* 3. 2 *B.* & *P.* 28

2. And in *C. B.* this may be done notwithstanding the lien of the attorney for his costs. *ibid. ibid.*

3. This Court will not allow an attorney's lien upon the costs to prevent a set off in costs between the parties to a suit. *Emden* v. *Darley*, *E.* 44 *G.* 3. 1 *N. R.* 22

4. If an execution be set aside with costs as having been sued out after the allowance of a writ of error, the Court will not permit the costs of the application to be set off against the costs of the action, but will compel the plaintiff to pay them forthwith. *Hill* v. *Tebb*, *T.* 45 *G.* 3. 1 N. R. *page* 311

COVENANT,

See ACTION PERSONAL. AGREEMENT. ARBITRATION, No. 8. CONDITION. COSTS, ii. 6. DEED. PARTY WALL, No. 2. PAYMENT, No. 1. SLAVE.

1. If a lease for 99 years, determinable on three lives, be conveyed in trust for *A.* for life, and *A.* covenant to use his utmost endeavours as often as any of the persons on whose lives the premises are held shall die, to renew the same by purchasing of the lord of the fee a new life, in the room of such as shall fail, it is no breach of the covenant, if upon one of the lives failing, he procure a renewal upon his own life. *Scudamore and Others* v. *Stratton and Others*, *T.* 39 *G.* 3. 1 *B.* & *P.* 455

2. Performance pleaded otherwise than in the terms of the covenant is bad even on general demurrer. *ibid. ibid.*

3. Under a covenant of a lessee of a coal mine to pay a moiety of all such sums of money as the coals there raised should sell for at the pit's mouth, the lessee was held liable to pay a moiety of the money, which the coals though sold elsewhere, would have produced at the pit's mouth. *Clifton* v. *Gerrard*, *H.* 36 *G.* 3. (Reversed on error, 7 *T. R.* 676.) 1 *B.* & *P.* 524

4. *A.* after granting certain premises in fee to *B.* and after warranting the same against himself and his heirs, covenanted that notwithstanding any act by him done to the contrary, he was seised of the premises

premises in fee, and that he had full power, &c. to convey the same; he then covenanted for himself, his heirs, executors, and administrators to make a cart way, and that *B.* should quietly enjoy without interruption from himself or any person claiming under him; and lastly, that he, his heirs and assigns and all persons claiming under him, should make further assurance. Held, that the intervening general words "full power, &c. to convey," were either part of the preceding special covenant, or if not, that they were qualified by all the other special covenants against the acts of himself and his heirs. *Browning* v. *Wright*, *M.* 40 *G.* 3.
2 *B.* & *P. page* 13

5. *A.* being possessed of a lease for years covenanted in an indenture for making a family provision that if he should die during the continuance of the term of the lease, his executors or administrators should assign the residue to *B.*; *A.* afterwards purchased the reversion in fee, and died. Held that *A.* did not by the terms of the covenant, intend to preclude himself from purchasing the fee, and therefore his executors were not liable upon that covenant. *Williamson* v. *Butterfield*, *H.* 40 *G.* 3. 2 *B.* & *P.* 63

6. Covenant by the assignor of certain shares in a patent right that he had good right, full power, and lawful authority, to consign and convey the said shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had or might have had over the same. Held that the generality of the former words of the covenant was not restrained by the latter. *Hesse* v. *Stevenson*, *M.* 44 *G.* 3.
3 *B.* & *P. page* 565

7. Covenant in a lease that the lessee would not dig gravel out of any part of the demised premises without consent of the lessor, or paying to him 10*s.* per load, except what should be dug out of two acres, part of the premises demised, and part of a garden late in the possession of *A. B.* By indorsement made on the lease before execution it was agreed that it should be lawful for the lessor to let any part of the within-demised premises for the purpose of making bricks or tiles, he paying the lessee 3*l.* for every acre which he should so let; and further that it should be lawful for the lessee to break up and dig for gravel any part of the within demised premises, he covenanting to pay to the lessor 20*l.* for every acre he should break up and dig, at or before the expiration of the time, and to make good the same. Held that the lessee was not entitled to dig for gravel in the two acres of garden ground mentioned in the lease, without making them good. *Flint* v. *Brandon*, *T.* 44 *G.* 3.
1 N. R. 73

8. If tenant in tail male demise for a term of 99 years, and his lessee assign over to another, but, before such assignment, tenant in tail male dies, without issue male, no action of covenant upon the lease can be maintained against the representatives of the grantor by such assignee, the lease being void at the time of the assignment,

ment, and no interest passing under it. *Andrew* v. *Pearce*, *H.* 45 *G.* 3. 1 N. R. *page* 158

9. A copyholder demised his copyhold to *J. S.* to hold for one year, and at the end thereof from year to year, for 13 years more, in all 14 years, if the lord would grant licence, but so as not to create a forfeiture, and covenanted that the lessee should quietly enjoy during the term aforesaid; and the lease contained many covenants and provisoes applicable only to a lease for several years. After the expiration of the first year the copyhold was purchased by the lord, and surrendered to a trustee for him; who immediately gave regular notice to quit to *J. S.* no licence to let having been obtained. Held that upon the expiration of the notice, the trustee might maintain an ejectment; and that no action would lie on the covenant for quiet enjoyment; though the contents of the lease were known to the lord before he completed his purchase, and though the covenant of the vendor against incumbrances contained an exception of the subsisting leases under which the tenants then held. *Luffkin* v. *Nunn*, *H.* 45 *G.* 3. 1 N. R. 163

10. A covenant in an indenture of lease to grant a new lease with all covenants, grants, and articles as in the said indenture contained does not bind the lessor to insert a covenant of renewal in the renewed lease. *Iggulden* v. *May*, *T.* 47 *G.* 3. 2 N. R. 449

COVERTURE,

See BAIL, i. 2. BARON AND FEME.

COUNTY,

See INDICTMENT, No. 7. VENUE.

COURTS,

See ASSUMPSIT, No. 2. BARON AND FEME, No. 4, 5, 6. CONSIGNOR AND CONSIGNEE, No. 2. EXTORTION. LIBEL, No. 4.

1. The Court will not refuse leave to enter a suggestion under the 22 *G.* 2. *c.* 47. on the ground that a court of conscience has no authority to try a question of bankruptcy. *Keay* v. *Rigg*, *E.* 37 *G.* 3. 1 *B.* & *P. page* 11

2. A Defendant is not liable to be sued in the county court for a debt not arising within the county, though he be resident therein. And a suggestion applied for on the ground of residence was refused. *Smith* v. *O'Kelly*, *T.* 37 *G.* 3. 1 *B.* & *P.* 75.

3. The jurisdiction of the Court of Conscience does not extend to contracts made on the high seas. *M'Collam* v. *Carr*, *E.* 38 *G.* 3. 1 *B.* & *P.* 223

4. The Court will not allow a suggestion for double costs under 23 *G.* 2. *c.* 33. where the original debt being above 40 shillings has by a balance of accounts been reduced below that sum. *ibid. ibid.*

5. If an attorney sue as a common person, the Court will give the Defendant leave to plead that the cause of action arose within the jurisdiction of the Court of Requests, together with other matters. *Tagg* v. *Madan*, *H.* 37 *G.* 3. 1 *B.* & *P.* 629

6. If an attorney of *C. B.* bring an action by original in that court against

against a Defendant resident in *Middlesex*, and recover under 40*s*., the Court will allow a suggestion to be entered under 23 *G*. 2. *c*. 33. *s*. 19. to entitle the Defendant to double costs. *Parker* v. *Vaughan*, *M*. 40 *G*. 3 2 *B*. & *P*. *page* 29

7. An action for use and occupation may be brought in the county court of *Middlesex*. *ibid*. *ibid*.

8. If the Plaintiff in an action of assault having recovered only 20*s*. damages, whereby he is entitled to no more than 20*s*. costs, bring an action on the judgment, and obtaining judgment by default in that action, enter it up for debt and costs, the Court on affidavit of the Defendant being resident in the city of *London* and liable to be summoned to the Court of Requests, will under the 39 & 40 *G*. 3. *c*. 104. set aside the judgment as to the costs. *Foott* v. *Coare*, *M*. 42 *G*. 3.
2 *B*. & *P*. 588

9. If a Defendant reside in *Middlesex*, and keep a warehouse within the city of *London*, jointly with another, but, after the commencement of an action against him for a small demand, tell the Plaintiff that he does not keep the warehouse in question, and the Plaintiff, upon inquiry in the neighbourhood of the warehouse, can obtain no intelligence respecting the Defendant, the Court will not under the 39 & 40 *G*. 3. *c*. 104. exempt the Defendant from payment of costs on the ground of the verdict being under 5*l*., and that he ought to have been summoned to the Court of Requests. *Jefferies* v *Watts*, *H*. 45 *G*. 3.
1 N. R. *page* 153

10. If an action on the case for an injury to a house for which the Plaintiff has delivered a bill of 1*l*. 10*s*. be commenced in the superior courts, proceedings therein may be stayed, the Plaintiff's remedy being in the county courts. *Melton* v. *Garment*, *M*. 46 *G*. 3.
2 N. R. 84

CURTESY.

An estate was devised to trustees and their heirs, till *A*., a female infant, should attain 21 or marry; and upon her attaining 21 or marrying, to *A*. and her heirs; and in case she should die under 21 without leaving issue, remainder over. *A*. married and had a child, which child died, and then *A*. died under 21. Held, that her husband was entitled to be tenant by the curtesy. *Buckworth* v. *Thirkell*, *B*. *R*. *T*. 25 *G*. 3.
3 *B*. & *P*. 652. *in notis*.

CUSTOM,

See Baron and Feme, No. 4, 5, 6. Copyhold, No. 1. Evidence, ii. 8, 9, 10. Gavelkind. Pleading, iii. 7.

It seems that the custom for the homage to assess a compensation in lieu of a heriot to be paid by an in-coming copyholder on surrender or alienation is not good. *Parkin* v. *Radcliffe*, *T*. 38 *G*. 3.
1 *B*. & *P*. 282

CUSTOMARY TENEMENTS,

See Partition, No. 2.

D.

DAMAGES,

See COSTS, i. 14. INTEREST OF MONEY, No. 4, 5. PENALTY. PRACTICE, vi. 3. WASTE.

In trespass for assault and battery, and not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault and battery with a view to reduce the verdict below the amount of the damage actually sustained, if those circumstances could have been pleaded. *Watson* v. *Christie*, *T.* 40 *G.* 3.

2 *B.* & *P. page* 224

DEBT,

See ABATEMENT, No. 1, 2. BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 10. BYE-LAW. EXECUTION, No. 2. EXECUTOR AND ADMINISTRATOR, No. 8. ILLEGAL CONTRACT, No. 3. PLEADING, v. 28. 37.

DECEIT,

See ACTION ON THE CASE, No. 5. 7.

DECLARATION,

See PRISONER, No. 5, 6.

DEED,

See BOND, No. 7. COMPOSITION, DEED OF. COVENANT. DOWER. GRANT. LEASE. PLEADING, v. 28. RELEASE. TREES.

A. by indenture (reciting that a suit was depending between him and *B.* respecting certain patents, and that the same could not be assigned without hazard of defeating the suit) granted absolutely the said patents together with some others, to *C.*, excepting, however, until the determination of the above-mentioned suit, such patents as should be necessary to support *A.*'s legal title; then followed a covenant, that *A.* upon the determination of the suit should assign the excepted patent to *C.*, and that until such assignment *A.* should stand legally possessed of the same: held, that the legal interest in the excepted patents vested in *C.*, upon the determination of the suit without assignment. *Cartwright* v. *Amatt*, *M.* 40 *G.* 3.

2 *B.* & *P. page* 43

DEFAMATION,

See EVIDENCE, ii. 32. PLEADING, ii. 10. v. 11. 25.

1. Action on the case for saying of a merchant, "he has brought a false bill of lading for half the cargo (meaning the lading of a particular ship) already," whereby he was injured as such merchant, and lost the confidence of several persons, (without naming them,) was held not maintainable, and judgment accordingly arrested, because the words did not of themselves impute any crime. *Feise* v. *Linder*, *E.* 43 *G.* 3. 3 *B.* & *P.* 372

2. Although a master be not in general bound to prove the truth of a character given by him to a person applying for the character of his servant, yet if he officiously state any trivial misconduct of the servant

vant to a former master, in order to prevent him giving a second character, and then himself upon application for a character, give the servant a bad character, the truth of which he is not able to prove, the jury may from these circumstances infer malice against the master in an action against him by the servant. *Rogers* v. *Clifton*, *M.* 44 *G.* 3. 3 *B. & P. page* 587

3. Defamatory words, which are actionable in themselves, are not the less so because they are alleged to have been spoken of one as a candidate to serve in parliament. *Harwood* v. *Astley*, *T.* 44 *G.* 3. 1 N. R. 47

4. If one call another "thief," together with many other names of general abuse, not imputing crimes, and no other evidence be given to explain the sense in which the word "thief" was used, and the jury find for the Plaintiff, the Court will not set the verdict aside; for the action may be maintained for the word "thief." *Penfold* v. *Westcote*, *M.* 47 *G.* 3. 2 N. R. 335

DEFEAZANCE,

See STAMPS, No. 10.

DE INJURIA, &c. PLEA OF;

See PLEADING, iii. 3, 4, 5, 6.

DEMURRAGE,

See AGREEMENT, No. 5. 8. PLEADING, v. 30.

DEPOSIT,

See MONEY HAD AND RECEIVED, No. 7. 9.

DEPUTY,

See AUTHORITY, No. 2, 3.

DESCENT,

See CURTESY. DEVISE, ii. 18.

J. A. devised all his lands to *S. A.* (his son by the first venter) when he should come to the age of 21 years, but if he should die before 21 years, and *D. A.* (the testator's daughter by the second venter) should be then living, he gave the same to her when she should attain 21 years. Testator died, and then *S. A.* died under age and without issue. Held, that on the death of *S. A.* the inheritance vested in *D. A.* his sister of the half-blood in preference to his uncle of the whole blood. *Doe d. Andrew* v. *Hutton*, *II.* 44 *G.* 3. 3 *B & P. page* 643

DESERTION,

See SEAMAN'S WAGES, No. 1, 2.

DETAINER,

See PRACTICE, ii. 3. PRISONER, No. 4. 6.

DETINUE.

1. In detinue, when the goods are alleged to have come to the Defendant by finding, it is sufficient for the Plaintiff to prove that the goods came to the Defendant by wrong. *Mills* v. *Graham*, *M.* 45 *G.* 3. 1 N. R. 140

2. At least, unless the finding be traversed. *ibid. ibid.*

DEVASTAVIT,

DEVASTAVIT,

See EXECUTOR AND ADMINSTRATOR, No. 1.

DEVISE,

See CURTESY. DESCENT. DOWER. EVIDENCE, ii. 21. POWER. WAY, RIGHT OF. WILL.

I. *By what Words Lands, &c. pass.*
II. *What Estate.*
III. *Revocation.*

I. *By what Words Lands, &c. pass.*

1. Lands usually occupied with a house will not pass under a devise of "a messuage with the appurtenances," unless it clearly appear that the testator meant to extend the word "appurtenances" beyond its technical sense. *Buck d. Whalley* v. *Nurton*, *T.* 37 *G.* 3. 1 *B. & P. page* 53

2. But if that do appear, they may pass. *ibid. ibid.*

3. The word "appurtenances" will carry orchards. *ibid. ibid.*

4. Under a general devise of all manors, messuages, lands, tenements, and hereditaments, leasehold messuages will not pass, unless it appear to have been the evident intent of the devisor that they should pass. *Thompson* v. *Lawley*, *M.* 41 *G.* 3. 2 *B. & P.* 303

5. *A.* by will devised "all his freehold and copyhold lands, tenements, and hereditaments" in trust for certain purposes, and afterwards purchased new lands; he then made a codicil whereby, after reciting that he had devised "all his freehold and copyhold lands, tenements, and hereditaments," to the trustees named in the will, he revoked the devise so far as it related to two of the trustees, and devised "his said lands, tenements, and hereditaments" to the other trustees upon the same trusts, and concluded with declaring the codicil to be part of his will. Held, that the after-purchased lands did not pass. *Bowes* v. *Bowes*, *Dom. Proc. T.* 41 *G.* 3. 2 *B. & P. page* 500

6. *A.* devised certain estates to *B.* for life, remainder to his sons and daughters in strict settlement, remainder to *C.* for life, remainder to his sons and daughters in like manner, remainder to his own right heirs, and died; *B.* being seised of the above estates as tenant for life, and also entitled to one-sixth of the reversion as one of the right heirs of *A.*, made his will, whereby he gave to his wife for life all such freehold and copyhold lands as he had purchased, or was seised of in fee simple or in exchange for other lands in *Kent*, and then, after reciting that he had granted a lease for years to *D.* of the lands whereof he was tenant for life under *A.*'s will, declared that in case such persons as should be tenants for life or otherwise of that estate by virtue of *A.*'s will should not molest *D.* in the possession of the said lands so leased, and at the expiration of the lease should grant a new lease to his (*B.*'s wife) for life, then he devised his lands purchased of *E.* and *F.*, and all lands that he then had or might have a right to, both freehold and copyhold, arising from exchange of land, act of parliament, or otherwise, in *Kent* devised to his wife for her life, to go with and be subject to the same entail

entail as the estates left by *A.* were or might be subject to by virtue of *A.*'s will, to take effect immediately after the decease of his wife; and in such case recommended his wife to give the furniture which belonged to the house on the estates left by *A.* to whomsoever might be living to enjoy it; but in case such persons as should be tenants for life or otherwise by virtue of *A.*'s will should refuse to grant such lease, or should disturb *D.*, then he gave to his said wife and her heirs all his freehold and copyhold lands and houses which he had before devised to her for life only, and all the rest and residue of his real estate whatsoever, and all the rest and residue of his personal estate of what nature or kind soever, or wheresover, he gave to his said wife and her heirs, executors, administrators, and assigns, for ever; *D.* was not molested, and a new lease was granted to the wife of *B.* for her life: held, that the wife of *B.* was entitled to the one-sixth of the reversion under the residuary clause in *B.*'s will. *Goodright dem. Earl of Buckinghamshire and Others*, v. *Marquis of Downshire and Wife*, *M.* 42 *G.* 3.
2 *B.* & *P. page* 600

7. *A.* devised thus: "As to my real and personal estate, subject to my debts and funeral expences, I give and devise as follows, viz. my real estate and all my personal estate unto *J. M.* and *O. W.* and their heirs on the following trusts, viz. to the intent that they dispose of my personal estate in discharging of my debts, funeral expences and such legacies as I may direct, and as to my real estates, subject to my debts, and such charges as I may make, I give and devise the same to *R. P.* for life:" held that under this devise the legal estate in the realty vested in *R. P.* for his life, and *J. M.* and *O. W.* took no estate therein. *Kenrick* v. *Lord William Beauclerk*, *T.* 42 *G.* 3.
3 *B.* & *P. page* 175

8. *A.* devised to his wife, his house and goods, with all his lands, goods, and chattels whatsoever, and wheresoever, for her life; and after her death to two younger sons till they should attain the age of 15, for their education. He then devised his aforesaid house, goods, and chattels equally to be divided between all his sons and daughters, share and share alike. Held that under the last clause of the devise the lands did not pass. *Roe d. Walker* v. *Walker*, *E.* 43 *G.* 3. 3 *B.* & *P.* 375

9. *A.* by will gave to his wife an annuity of 200*l.* for her life, in addition to her jointure (which was secured upon an estate in the *West Indies*,) and 6000*l.* to his two younger children, to be paid at 21, and appointed *B. C.* and *D.* as trustees of inheritance for the execution thereof: held, that no interest passed to *B. C.* and *D.* in the testator's real estates. *Trent* v. *Hanning*, *M.* 45 *G.* 3. 1 N. R. 116 (Contrà 7 *East*, 97. by three Judges against one.)

10. Devise of real and personal estate to trustees, their heirs, executors, and administrators, in trust to lay out the personalty in land, and during the lives of the testator's sons, *A. B.* and *C.* and of his grandson *D.* the son of *A.*, and

and of such other sons as *A.* then had or might have, and of such issue as *D.* might have, and of such issue as any other sons of *A.* might have, and of such sons as *B.* and *C.* might have, and of such issue as such sons might have, as should be living at the time of the testator's decease, or born in due time afterwards, and during the lives and life of the survivors or survivor, to receive the rents and profits of the real estate devised and to be purchased, and lay out the same, from time to time, as they should arise, in land; and after the death of the survivor of such persons, to divide the whole into three lots, and to convey one to the eldest male lineal descendant of each of his three sons in tail male, with remainders to the second and third, and every other male lineal descendant, with cross remainders in tail male; remainder to the trustees in fee, upon trust to sell and pay the produce to the king, to be applied to the use of the sinking fund as should be directed by parliament. This is a good devise in law, and equity will enforce the trusts. *Thellusson* v. *Woodford and others*, *T.* 45 *G.* 3. 1 N. R. *page* 357

11. Testator, after directing his debts and funeral expences to be paid by his executors, and making several bequests of annuities and money, gave to his five grandchildren, whom he appointed executors, "all the remainder of my property whatsoever and wheresoever, to be divided equally, share and share alike, after their paying and discharging the before mentioned annuities, legacies, and demands, or any I may hereafter make by codicil to this my will; all my goods, stocks, bills, bonds, book-debts, and securities in the *Witham* drainage in *Lincolnshire*, and funded property:" held that his real estate did not pass under the residuary clause. *Roe d. Helling* v. *Yeud*, *T.* 46 *G.* 3. 2 N. R. *page* 214

II. *What Estate.*

1. *A.* devised all his freehold and leasehold estates "to *B.* and the issue of her body as tenants in common, but in default of such issue, or being such if they should all die under 21, and without leaving issue" then over; held that all the limitations subsequent to that to *B.* being contingent, the remainders in the freehold were barred by fine and recovery, but that the leasehold vested in the remainderman on the death of *B.* without issue. *Burnsall* v. *Davy and others*, *H.* 38 *G.* 3. 1 *B.* & *P.* 215

2. Testator devised "all his freehold, leasehold, &c. estates," to *A.* in fee, provided that if *B.* should have "any son or sons," then "to such male issue as *B.* shall have when *A.* attains 21," but *A.* to have the rents and profits of the estates till he attains 21; by a subsequent clause he gave "all the residue of his real and personal estates whatsoever, not before disposed of to *A.* his heirs, &c. for ever." *B.* had one son who died before *A.* attained 21, and a second who was born three weeks after that period. Held that the first son took nothing, but that the second took an estate in tail male. *Whitelock, Administrator, &c.* v. *Heddon and others*, *E.* 38 *G.* 3. 1 *B.* & *P.* 243

3. Devise to the testator's seven sisters, share and share alike; on the death of any of them her share to go to her first and other sons in tail, and for default of such sons, to her daughters as tenants in common; in case of any of the seven sisters dying without issue, or such issue dying under 21, the surviving sisters to take her share, and if all the sisters should die without issue, or such issue die under 21, then over; held that the words "in default of such sons," did not make the remainder to the daughters contingent, which took effect notwithstanding the birth of a son. *Doe d. Dacre* v. *Dacre*, *E.* 38 *G.* 3. (affirmed on error in K. B. 8 *Term Rep.* 112.) 1 *B. & P. page* 250

4. Testator devised in fee to *P. D.* his brother for life, and after his decease to *G. P.* his niece for life, then to trustees to preserve contingent remainders, and after the decease of *P. D.* and *G. P.* "in trust for the use of the first son of *G. P.* and his heirs, and for *want of such issue* to the other sons of his niece and their heirs in succession, and *for want of such issue male*, then to the daughters of *G. P.* and for want of such issue over;" held that the words *for want of such issue male*, made the remainder to the daughters contingent, and that it was therefore defeated by the birth of a son. *Keene d. Pinnock et ux.* v. *Dickson*, *B. R. M.* 23 *G.* 3. 1 *B. & P.* 254 *n.*

5. Devise to *S. N.* son of *T.* and *M. N.* for life remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *S. N.* and their heirs male; for default of such issue to the use of the daughters of *T.* and *M. N.* and for default of such issue to the use of the right heirs of *T. N.* for ever; held that the word "such" referred to the daughters of *T.* and *M. N.* before mentioned only, and restrained the limitation to them to an estate for life. *Denn d. Briddon et ux.* v. *Page and Another*, *B. R. M.* 23 *G.* 3. 1 *B. & P. page* 261 *n.*

6. *A.* after giving a life estate in certain copyholds to *B.*, devised as follows: "All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever and wheresoever, and also all my goods, &c. *after payment of my just debts and funeral expences*, I give, devise, and bequeath the same unto my wife *S. C.*" Held that under this devise *S. C.* took a fee. *Denn d. Mellor* v. *Moore in error*, *M.* 37 *G.* 3. 1 *B. & P.* 558

7. In the above case on error in the House of Lords, it was held that under the above devise *S. C.* took only an estate for life. *Moore* v. *Denn d. Mellor*, *T.* 40 *G.* 3. 2 *B. & P.* 247

8. Devise to *G. L.* the testator's heir at law for life, and from and after his death to *C. B.* her heirs and assigns, in case she shall survive and outlive the said *G. L.* but not otherwise, and in case she shall die in the lifetime of the said *G. L.*, then to *J. L.* his heirs and assigns for ever: held that the devise to *C. B.* was a contingent remainder, and barred by a fine levied by *G. L.* *Doe d. Planner* v. *Scudamore*, *M.* 41 *G.* 3. 2 *B. & P.* 289

9. Devise

9. Devise "to *L. S.* her heirs and assigns for ever, but if she shall happen to die leaving no child or children, lawful issue of her body living at the time of her death, then to *F. B.* and his heirs:" held that the devise in fee to *L. S.* was not restrained by the subsequent words to an estate tail, and that the devise over to *F. B.* was a good executory devise. *Doe. d. Barnfield* v. *Wetton*, *M.* 41 *G.* 3.
2 *B.* & *P. page* 324

10. *A.* devised all his estates in the county of *D.* to a trustee for 200 years, to the use of the trustee during the life of his son *J. S.* to preserve contingent remainders, nevertheless to permit *J. S.* to receive the rents and profits; and after his decease to the use of the first son of the said *J. S.* to be begotten on the body of the woman he should happen to marry, and the heirs male of such first son, and for want of such issue to the use of the second, third, fourth, and every other son of *J. S.* and the heirs male of their bodies in succession, and for want of such issue male, then to the use of his daughter *E. S.* her heirs and assigns for ever, with a residuary clause in favour of *J. S.*; the testator afterwards made a codicil whereby he devised all his estates to his son *J. S.* and his children lawfully to be begotten, with power for him to settle the same by will or otherwise on such of them as he should think proper, and for default of such issue, then to his daughter *E. S.* and her children lawfully to be begotten with a similar power, and in default of such issue to *J. S.* and *E. S.* equally between them; and he further provided that a settlement of 200*l.* per annum should be made on any woman whom his son should happen to marry, and that his estates should be chargeable therewith. At the time of making the codicil *J. S.* was married, but had no child: held that the codicil was to be construed independent of the will; and that under the codicil *J. S.* took an estate tail, with a power to settle the estates on all or any of his issue in such way as he should appoint, and thereby determine the estate tail so far as it should be inconsistent with such settlement. *Seale* v. *Barter*, *T.* 41 *G.* 3. 2 *B.* & *P. page* 485

11. Devise to testator's first son by his wife gotten or to be begotten, for life, remainder to trustees to preserve contingent remainders; remainder to the several heirs male of such first son lawfully issuing, so as the elder of such sons, and the heirs male of his body should always be preferred and take before the younger, and the heirs male of his body; remainder, to the testator's second, third, fourth, and all and every other son and sons for their several and respective lives; remainder to trustees to preserve, &c. remainder to the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such sons and the heirs male of his body, should be always preferred and take before the younger of the same sons, and the heirs male of his and their body and bodies; remainder

to the testator's first and other daughters for their lives; remainders to trustees, &c.; remainder to the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such daughters, and the heirs male of her body, should always be preferred and take before the younger of the same daughters and the heirs male of her and their body and bodies. There were other clauses in the will, by which after giving an estate for life to the first taker, the testator limited to trustees, &c., remainder to the first and other sons of such first taker, and the heirs of their bodies, so as the elder of such sons, and the heirs of their bodies should always be preferred before the younger of the same sons and the heirs male of their bodies. Held that the first son of the testator took an estate tail. *Poole* v. *Poole*, *H.* 44 *G.* 3.
3 *B.* & *P. page* 620

12. Devise to the use and behoof of the testator's niece, *S. C.* and his two nieces, *E. G.* and *A. C.*, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors as tenants in common and not as joint tenants. Held that under this devise *S. C.*, *E. G.* and *A. C.*, took as tenants in common. *Garland* v. *Thomas*, *T.* 44 *G.* 3.
1 N. R. 82

13. Testator devised to *A.* for life, and after her death to *B.* for life, and at the decease of *A.* and *B.* or the survivor, gave all his real estate to *C.* if he should live to attain 21; but in case he should die before that age, and *D.* should survive him, in that case to *D.* if he should live to attain 21, but not otherwise; but in case both *C.* and *D.* should die before either of them should attain 21, then to *E.* in fee. Held that *C.* took a vested remainder. *Bromfield* v. *Crowder*, *T.* 45 *G.* 3. 1 N. R. *page* 313

14. The devisor after using these introductory words, "as touching such worldly and personal estates wherewith it has pleased God to bless me, I give and dispose of the same in the following manner," gave an estate for life to his wife in all his freehold, leasehold, and copyhold, and, after her death gave "all his lands, houses, &c. in manner following;" to *A.* one of his grandsons, he gave "all his lands freehold, copyhold, and leasehold in *E.*," and proceeded "also I devise all my estate freehold and copyhold in *H.*" to him; to *B.* another grandson, he gave all his estate, lands, &c. called or known, &c., with 500*l.*; and to *C.* his remaining grandson and his heir at law, "the house I now live in, with all the lands, &c. belonging to the same, and also all my houses and lands commonly called or known, &c., and also 500*l.*" Held that *A.* took only an estate for life in remainder in the devisor's estate in *E. Doe d. Wright* v. *Child*, *T.* 45 *G.* 3. 1 N. R. 335

15. *A.* being seised of lands, holden upon leases for lives, devised to *B.*, his brother, all his real and freehold estates, subject to an annuity to his mother for her life, "but in case

case *B.* should die before he attained the age of 21 years, *or* without issue living at his death," to his mother for ever. *A.* died; *B.* attained the age of 21 years, and then died without issue. Held that the word "or" in the devise over must be construed as "and;" and that the mother took nothing upon the death of *B.* *Fairfield d. Hawkesworth and others*, v. *Morgan and others Dom. Proc. in error*, *M.* 46 *G.* 3.

2 N. R. *page* 38

16. *A.* devised a house to his mother for life, and after her death "to the eldest son of *E. K.*, and if *E. K.* should have no male heir, then to the eldest son of *J. K.*" He also devised copyhold lands "to the eldest son of *E. K.*, but if the said *E. K.* should have no male heir, then my will is that the aforesaid lands and tenements I bequeath to the aforesaid son of *J. K.*, to him and his heirs for ever." But if the said eldest son should offer to sell or mortgage such copyhold lands and tenements aforesaid, then he gave the aforesaid lands and tenements to *T. C.* in fee. He then gave his personal estate to *T. C.*, directing him "to be at the charges of taking up and admitting the said eldest son as aforementioned to the said copyholds out of the said personal estate, and in the name of the said *K.*" He then gave the rents and profits of the copyholds to *T. C.* for seven years, and then "to the aforementioned eldest son. But if the said *T. C.* should die before the end of the seven years, then the aforesaid eldest son of the *K.*'s to take and enjoy the said estate forthwith to them and their heirs for ever." Held, that the eldest son of *E. K.* took an estate in fee under this will in the copyhold premises. *Wright* v. *Bond*, *H.* 46 *G.* 3.

2 N. R. *page* 125

17. Testator, after a general introductory clause "as to his worldly estate," devised to his wife during her natural life all his houses in *Swan-lane*; he then devised several houses without words of inheritance to his sons *T. B.* and *S. B.*, and after the death of his wife he gave to his son *W. B.* all those his three houses or tenements situate in *Swan-lane*, in the tenure or occupation of *A. B.* and *C.*; he likewise gave several legacies to be paid within six months after his death, and concluded thus: "and I charge all my estates both real and personal with the payment of the above or aforementioned legacies, and I appoint my beloved wife and my son *T. B.*, my son *S. B.* and my son *W. B.*, executors of this my will, and after my just debts and funeral expences are paid, then the surplus of my effects, both real and personal, to be equally divided to my executors which shall be then living." Held that *W. B.* only took an estate for life under the devise of the three houses in *Swan-lane* after the death of his mother, notwithstanding the words of charge, &c.; but that he took a fee in one-fourth part under the residuary clause. *Doe d. Briscoe and Others* v. *Clarke and Wife*, *M.* 47 *G.* 3.

2 N. R. 343

18. Devise of all the testator's real and

and personal estate and effects to *B. V.* his wife, in trust for the education of his daughter *M. V.* till 21, and in case of the death of his daughter before 21, the whole of his said estate and effects to his wife. Testator died, leaving *B. V.* his wife, and *M. V.* his only child. *B. V.* died, leaving *M. V.* also her only child, and then *M. V.* died under age and without issue. Held, that the heir of *M. V.* *ex parte maternâ* was entitled to succeed. *Goodtitle d. Castle and Another* v. *White*, *H.* 47 *G.* 3.
2 N. R. *page* 383

III. *Revocation*,

See ESTOPPEL, No. 3.

1. *A.* seised in fee of the manors of *Stanford*, &c., and also of the manors of *Swinford* and *South Kilworth*, entered into marriage articles to secure a jointure to his intended wife upon the above estates, and to make provision for the younger children, and agreed to settle the *Stanford* estate upon his eldest son in strict settlement, subject to part of such jointure and provision. He then devised those estates in case he should happen to die without issue, and subject to such jointure as he might make, to the lessors of the Plaintiff for 500 years, upon the trusts therein expressed. Afterwards, by separate deeds of lease and release, he conveyed first the *Stanford* estate to trustees in fee, to the use of himself in fee, till the marriage, with divers limitations in pursuance of the articles, and subject to a term of 500 years for securing part of his wife's jointure, remainder to the use of himself in fee; secondly, the *Swinford* and *South Kilworth* estates to trustees in fee, to the use of himself in fee till the marriage, to the use and intent that his intended wife should take the other part of her jointure thereout if she survived him, and after his death remainder to trustees for 500 years to secure such jointure, remainder to himself in fee. He afterwards married and died without issue. Held, that the will was revoked as to both estates by the deeds of settlement, though they were consistent with the provisions of the will, and though the devisor took back the estate he parted with by the same instruments. *Goodtitle d. Holford and Others* v. *Otway*, *M.* 37 *G.* 3.
1 *B.* & *P.* *page* 576

2. Held also, that the latter estate was not excepted from this revocation by the circumstance of the conveyance of that estate to the trustees, being merely for the purpose of creating a term to secure the wife's jointure. *ibid.* *ibid.*

3. If a testator have executed a devise of lands in the presence of three witnesses to two persons as joint-tenants in fee, afterwards strike out the name of one of the devisees, and there be no republication, the erasure will only operate as a revocation of the will *pro tanto*. *Larkins* v. *Larkins*, *H.* 42 *G.* 3. 3 *B.* & *P.* 16. 109

4. If a testator after having made his will levy a fine to such uses as he shall by deed or will appoint; and die without making any new will, the will made prior to the fine is revoked thereby. *Doe d. Dilnot* v. *Dilnot*, *E.* 47 *G.* 3. 2 N. R. 401

DIPLOMA,

DIPLOMA,

See EVIDENCE, ii. 32.

DISCONTINUANCE,

See RIGHT, WRIT OF, No. 4. 6.

1. *Assumpsit* against three; two pleaded a debt of record by way of set-off; the Plaintiff replied *nul tiel record*, and gave a day to the two Defendants, but entered no suggestion respecting the third: held on demurrer, that the action being discontinued, judgment must be given against the Plaintiff, even though the Defendant's plea were bad. *Tippet and Others* v. *May and two Others*, *E.* 39 *G.* 3.
1 *B.* & *P. page* 411

2. The Plaintiffs as executors having sued one of the co-obligors on a joint and several bond in K. B., to which usury was pleaded, suffered a nonsuit, and brought a second action against another co-obligor in C. B., in which the case having gone off *pro defectu juratorum*, they brought a third action against all three co-obligors, in order to exclude the evidence of one upon the usury, and moved to discontinue the second action, without costs; but the Court would only allow them to discontinue on payment of costs. *Melhuish and Another, Executors of R. Hole*, v. *Maunder*, *M.* 46 *G.* 3. 2 N. R. 72

3. If Defendant demur in replevin without adding an avowry and prayer of return, it is no discontinuance. *Serres and Wife* v. *Dodd*, *E.* 47 *G.* 3. 2 N. R. 405

DISTRESS,

See REPLEVIN, No. 6. RATE, No. 4.

A landlord may distrain for the rent of ready furnished lodgings, *Newman* v. *Anderton*, *T.* 46 *G.* 3.
2 N. R. 224

DISTRINGAS,

See PARTNERS, No. 3. PRACTICE, i. 3, 4. vi. 3.

DISTURBANCE,

See TIME, No. 2. TOLL.

DOMICILE.

1. Personal property follows the person of the owner, and in case of his decease must be distributed according to the law of the country in which he was domiciled, at the time of his death, without regard to the actual situation of the property. *Bruce* v. *Bruce*, *Dom. Proc.*, *April* 1790.
2 *B.* & *P. page* 229. *notis.*

2. A person born in *Scotland*, having gone out to *India* in the service of the *East-India Company*, and having died there, it was held that *India* was the place of his domicile. *ibid. ibid.*

3. For the place where a man is, shall *primâ facie* be taken to be the place of his domicile. *ibid. ibid.*

4. But if such person had gone to *India* in the king's service, or for any temporary purpose, it seems that the domicile of his birth would not have been altered. *ibid. ibid.*

5. Mere intention to return to his native country at some future period, is not sufficient to prevent the change of domicile if the person die before such intention be put in execution. *ibid. ibid.*

DOWER.

A. seised in fee, devised to *B.* his son for

for life, remainder to the heirs of his body in tail, remainder to his own three daughters and their heirs; on the death of *A.*, *B.* entered and became seised of all *A.*'s lands, and by deed between himself and his mother, assigned to her the possession of a third part of all the premises, to hold to her and her assigns for her life, as if she had been in possession of the same by virtue of a writ of dower, and appointed *C.* and *D.* attornies, to enter and give livery and seisin of one full third part; and the indorsement of the deed stated, that *C.* and *D.* delivered seisin of all the premises to the mother, to hold according to the uses and intentions of the deed. *B.*'s mother having become seised of an undivided third part of all the lands, and during her life *B.* levied a fine *sur conusance de droit come ceo*, with proclamations of the whole of the premises, and suffered a recovery, and died leaving no issue, but having devised away all the lands of *A.* to a stranger: held, that the deed between *B.* and his mother, and the livery made thereon, was a good assignment of dower to her; and therefore the fine and recovery suffered by *B.*, and non-claim within five years after the death of *B.* did not bar the remainder in fee to the daughters of *A.* in that one-third part which *B.*'s mother had in dowry at the time of such fine and recovery. *Rowe* v. *Power, &c. in Error*, *M.* 46 *G.* 3. 2 N. R. 1

E.

EAST-INDIA COMPANY.

See ILLEGAL CONTRACT, No. 5. INSURANCE, i. 14. ii. 20. iv. 2. TRADE.

1. The exclusive right of trading to the *East-Indies* granted to the *East-India* Company by 9 & 10 *W.* 3. has never been put an end to, and every infringement of it is a public wrong. *Camden and Others* v. *Anderson, in Error*, *E.* 38 *G.* 3. 1 *B.* & *P. page* 272
2. Though such parts of 9 & 10 *W.* 3. as inflicted penalties, &c. were repealed by 33 *G.* 3. *c.* 52.; and though the latter act says, "no acts or parts of acts thereby repealed shall be pleaded or set up in bar of any action," &c. yet it is competent to underwriters who have subscribed policies on ships trading to the *East-Indies* in contravention of 9 & 10 *W.* 3. to avail themselves of the illegality of such trading, in an action brought on the policies. *ibid. ibid.*
3. The sales of the *East-India* Company being subject to a regulation that any buyer not making good the remainder of his purchase-money on or before the day limited for such payment, should forfeit the deposit, "and should be rendered incapable of buying again at any future sale until he should have given satisfaction to the Court of Directors:" held, that the term satisfaction must be construed to mean pecuniary compensation for the non-performance of his agreement to pay on the appointed day, and

and that a buyer having made default on the day, but afterwards, within a future time given to him by the *East-India* Company, paid the remainder of the purchase-money with interest, might maintain an action against the *East-India* Company for refusing to allow him to become a bidder at their sales, such sales being by 9 and 10 *W.* 3. c. 44. *s.* 69. declared to be public and open sales. *Eagleton* v. *East-India* Company, *H.* 42 *G.* 3.
3 *B.* & *P. page* 55

4. *Quære*. Whether since the passing of 18 *G.* 2. *c.* 26. which regulates the deposits, forfeitures, and incapacities of bidders at the tea-sales of the *East-India* Company, the *East-India* Company can make or enforce any other regulations affecting those sales than such as the act of parliament has enacted?
ibid. ibid.

EAST INDIES,
See INDIA.

EFFECTS,
See EMBEZZLEMENT.

EJECTMENT,
See ACTION ON THE CASE, No. 1. COSTS, iii. 3. DOWER. LIMITATIONS OF ACTIONS, No. 1. MORTGAGE.

1. Service of a declaration in ejectmen on one of two tenants in possession is good service on both. *Doe d. Bailey* v. *Roe*, *H.* 39 *G.* 3.
1 *B.* & *P.* 369

2. The mere acknowledgment of the wife of the tenant in possession that she has received a declaration in ejectment will not bind her husband. *Goodtitle d. Read* v. *Badtitle*, *H.* 39 *G.* 3. 1 *B.* & *P. p.* 384

3. Service of a declaration in ejectment upon a person appointed by the Court of Chancery to manage an estate for an infant, is not sufficient. *Goodtitle d. Roberts and Wife* v. *Badtitle*, *H.* 39 *G.* 3.
1 *B* & *P.* 385

4. If a declaration in ejectment be served upon a tenant, and his landlord be admitted to defend, the Plaintiff can only recover such premises as the tenant is proved to be in possession of. *Fenn d. Blanchard* v. *Wood*, *M.* 37 *G.* 3.
1 *B.* & *P.* 573

5. Service of a declaration in ejectment on the wife of the tenant in possession at his house is sufficient. *Doe d. Baddam* v. *Roe*, *M.* 40 *G.* 3. 2 *B.* & *P.* 55

6. Affidavit of service of a declaration in ejectment made by a person who saw the declaration served, and heard it explained to the tenant in possession, is sufficient to entitle the Plaintiff to judgment against the casual ejector. *Goodtitle d. Wanklen* v. *Badtitle*, *H.* 40 *G.* 3. 2 *B.* & *P.* 120

7. A copyholder demised his copyhold to *J. S.* to hold for one year, and at the end thereof, from year to year, for 13 years more, in all 14 years, if the lord would grant licence, but so as not to create a forfeiture; and covenanted that the lessee should quietly enjoy during the term aforesaid; and the lease contained many covenants and provisoes applicable only to a lease for years. After the expiration of the first year the copyhold was

was purchased by the lord, and surrendered to a trustee for him, who immediately gave a regular notice to quit to *J. S.* no licence to let having been obtained: held, that upon the expiration of the notice, the trustee might maintain an action of ejectment, though the contents of the lease were known to the lord before he completed his purchase, and though the covenant of the vendor against incumbrances contained an exception of the subsisting leases under which the tenants then held. *Luffkin* v. *Nunn*, *H.* 45 *G.* 3. 1 N. R. *page* 163

8. Service of a declaration in ejectment, by nailing it on the barn door of the premises, in which barn the tenant had occasionally slept, there being no dwelling-house, and the tenant not being to be found at his last place of abode, was allowed to be good service. *Fenn d. Buckle* v. *Roe*, *T.* 45 *G.* 3. 1 N. R. 293

9. The Court held service of a declaration in ejectment on the wife of the tenant in possession sufficient, provided it could be shewn that the wife lived with her husband. *Jenny d. Preston* v. *Cutts*, *T.* 45 *G.* 3. 1 N. R. 308

10. A declaration in ejectment contained two demises by two different lessors of two distinct undivided thirds; judgment was given that the Plaintiff "do recover his said terms." On error it appeared from the facts stated on a bill of exceptions to the Judge's directions on a point of law, that the ejectment respected only one undivided third: held, well enough on this record, where the point was only raised by bill of Exceptions. *Rowe* v. *Power*, *&c. in Error*, *M.* 46 *G.* 3. 2 N. R. *page* 1

11. *Semble*, that it would be well enough even on special verdict. *ibid.*

12. If upon notice to quit given to a tenant, he gives notice to his undertenants to quit at the same time, and upon the expiration of the notice he quits so much as is occupied by himself, but his undertenants refuse to quit, an ejectment may still be maintained against him for so much as his undertenants have not given up. *Roe* v. *Wiggs*, *M.* 47 *G.* 3. 2 N. R. 330

ELECTIONS,

See PLEADING, v. 25. TREATING.

EMBARGO,

See AGREEMENT, No. 4, 5. INSURANCE, iii. 5. SEAMAN'S WAGES, No. 4.

EMBEZZLEMENT,

See INDICTMENT, No. 6, 7.

Exchequer bills purchased by the Bank for a good consideration, but signed in the name of the auditor of the Exchequer by a person not legally authorized, are securities, or at least effects within the meaning of the 15 *G.* 2. *c.* 13. *s.* 12.: and if a servant of the Bank embezzle such Bills, he may be convicted of felony under that statute. *Rex* v. *Aslett*, *E.* 44 *G.* 3. 1 N. R. 1

ENEMY,

See BANKRUPT, i. 2.

1. A native of a foreign state in amity with this country taken in an act of hostility on board an enemy's fleet, and brought to *England* as a prisoner of war, is not disabled from suing while in confinement on a contract entered into as a prisoner of war. *Sparenburgh* v. *Bannatyne*, *M.* 38 *G.* 3. 1 *B. & P. page* 163
2. The Court refused to allow judgment to be entered on an old warrant of attorney, it appearing by the Plaintiff's affidavit that she was resident in an enemy's country. *De Luneville* v. *Phillips*, *H.* 46 *G.* 3. 2 N. R. 97

ERROR,

See BAIL, i. 21. v. EXCHEQUER-CHAMBER, COURT OF. INTEREST OF MONEY, No. 4.

ERROR, WRIT OF,

See BAIL, v. NEW TRIAL, No. 1. PRACTICE, x. PRISONER, No. 2.

1. The teste of a writ of error need not be on a seal day. *Hill* v. *Tebb*, *T.* 45 *G.* 3. 1 N. R. 298
2. A writ of error may be made returnable before the day on which the judgment is actually signed, if the writ of error and judgment are of the same term. *ibid. ibid.*

ESCAPE,

See BAIL, i. 8. EVIDENCE, ii. 4. 11. 25, 26. PLEADING, v. 3, 4. 20, 21.

1. If a sheriff's officer having taken a prisoner in execution permit him to go about with a follower of his before he take him to prison, it is an escape. *Benton* v. *Sutton*, *E.* 37 *G.* 3. 1 *B. & P. page* 24
2. *Quære*, Whether it would not have been an escape also if the officer himself had accompanied him. *ibid. ibid.*
3. The sheriff having arrested a party, permitted him to go at large without taking a bail bond, returned *cepi corpus*, and before the expiration of the rule to bring in the body put in bail: held, that he was not liable either to an action of escape or false return. *Pariente* v. *Plumbtree*, *M.* 40 *G.* 3. 2 *B. & P.* 35
4. If after the commencement of an action of escape against the sheriff for not taking a bail-bond, good bail be put in and justified in the room of bail before put in, who by the practice of the Court were a mere nullity, the Plaintiff cannot recover. *Allingham* v. *Flower*, *T.* 40 *G.* 3. 2 *B. & P.* 246

ESTOPPEL,

See BOND, No. 7. COVENANT, No. 8.

SLAVE.

1. Debt on bond conditioned for the performance by *R. J.* of all the covenants on his part mentioned in a certain indenture bearing even date with the bond, made or expressed to be made between the Plaintiff and the said *R. G.* Plea, that before the execution of the bond it was agreed that the Plaintiff should grant to *R. G.* a lease under certain covenants, and that the Defendant should enter into a bond as a surety for the performance of those covenants; that the Defendant did accordingly enter into the bond

bond on which the action was brought, and that the indenture mentioned in the condition thereof is the lease so agreed upon and no other, but that the said lease never was executed: held on demurrer, that the Defendant was estopped by the condition of the bond from pleading this matter. *Hosier* v. *Searle*, *M.* 41 *G.* 3.
2 *B.* & *P. page* 299

2. Defendant is estopped by the recognizance of bail entered into for him by the name in which he is sued, from pleading a misnomer, though he himself be no party to the recognizance. *Meredith* v. *Hodges*, *T.* 47 *G.* 3. 2 N. R. 453

3. A testator having devised his lands suffered a recovery thereof, in which as well as in the deed to make a tenant to the *præcipe*, the tenant was called *Edward*, his real name being *Edmund*. In ejectment by the heir at law against the devisees; held that the recovery was good by estoppel, against the testator and all persons claiming under him, and that the will therefore was revoked thereby. *Doe d. Lushington* v. *Bishop of Landaff and others*, *T.* 47 *G.* 3. 2 N. R. 491

EVICTION,

See MONEY HAD AND RECEIVED, No. 6.

EVIDENCE,

See ACTION ON THE CASE, No. 4. AGREEMENT, No. 2. 6. ARBITRATION, No. 4. BYE-LAWS. COSTS, i. 12. DAMAGES. DETINUE. EJECTMENT, No. 4. INQUIRY, WRIT OF, No. 1. INSURANCE, i. 9. LIMITATION OF ACTIONS, No. 2. MISNOMER. MONEY HAD AND RECEIVED, No. 10. NEW TRIAL, No. 3. PAYMENT, No. 3. PAYMENT OF MONEY INTO COURT, No. 2. 5, 6. 8. PLEADING, v. 28. 36. PRACTICE, iv. RELEASE, No. 2. STAMPS, No. 5. TITHES, No. 6, 7. VARIANCE. VENUE, No. 6.

I. *Of the Competency of Witnesses.*
II. *Of the Evidence of particular Facts or Averments.*
III. *Of Stamps.*

I. *Of the Competency of Witnesses.*

1. A bond having been executed by *A.* and attested by one witness, was carried into an adjoining room and shewn to *B.*, who was desired to attest it also, which he accordingly did in the presence of *A.*: held that *B.* was a good witness to prove the execution. *Parke* v. *Mears*, *T.* 40 *G.* 3.
2 *B.* & *P. page* 217

2. A person whose name is forged as drawer of a bill is not a competent witness to disprove an indorsement on the bill made by the party who forged it, respecting the payment of interest upon that bill. *Rex* v. *Crocker*, *M.* 46 *G.* 3. 2 N. R. 87

3. In an action of trespass against the sheriff for taking the goods of *A.* in execution for the debt of *B.*, where the question was whether the goods had been previously assigned by *B.* to *A.* or not, *B.* was held not to be a competent witness to disprove the assignment to *A.* *Bland* v. *Ansley and others*, *M.* 47 *G.* 3. 2 N. R. 331

4. In

4. In an action on a policy of insurance on goods from *London* to *Emden*, where the ship was lost by putting into the *Texel;* held, that the captain as part owner of the ship, was a competent witness to prove that the ship originally sailed on the voyage insured by the direction of the owners of the goods, though not to prove that the deviation was justified by necessity. *De Symonds* v. *De La Cour*, *M.* 47 *G.* 3. 2 N. R. 374

II. *Of the Evidence of particular Facts or Averments.*

1. Delivery of an attorney's bill is conclusive evidence, on a taxation by the prothonotary, against an increase of charge in a subsequent bill on any of the items contained in the first; and strong presumptive evidence against any additional items. *Loveridge* v. *Botham*, *E.* 37 *G.* 3. 1 *B.* & *P.* 49

2. In an action on an attorney's bill, the *Nisi Prius* roll is good *primâ facie* evidence that the action was not commenced till the expiration of a month after the delivery of the bill. *Webb* v. *Pritchett*, *E.* 38 *G.* 3. 1 *B.* & *P.* 263

3. Payment of money into Court is an admission of a legal demand only. *Ribbans* v. *Crickett*, *E.* 38 *G.* 3. 1 *B.* & *P.* 264

4. In escape against the sheriff if the Plaintiff aver in his declaration, that *J. S.* was arrested "under a writ indorsed for bail by virtue of an affidavit now on record," he must produce the affidavit in evidence, though the latter part of the averment was unnecessary. *Webb* v. *Herne and Another sheriff of Middlesex*, *T.* 38 *G.* 3. 1 *B.* & *P. page* 281

5. *Secus* if the declaration only state that a writ was sued out, indorsed for bail. *Semb.* *ibid.* 282

6. If the abandonment of a contract be made the ground of an action, it is not competent to the Plaintiff to shew that a contract has existed and been abandoned without proving the specific contract. *Walker* v. *Constable*, *T.* 38 *G.* 3. 1 *B.* & *P.* 306

7. In debt on bond if one of the attesting witnesses be dead, and the other beyond the process of the Court, it is sufficient to prove the handwriting of the witness that is dead. *Adam and Wife Executrix* v. *Kerr*, *M.* 39 *G.* 3. 1 *B.* & *P.* 360

8. *Qu.* Whether evidence of a custom in *Jamaica* to execute bonds by substituting a mark with a pen for a seal, be admissible in support of a declaration on a bond sealed, &c.? *ibid.* *ibid.*

9. Evidence that the homage has been accustomed to assess a certain sum of money as a heriot upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for a heriot in kind upon alienation. *Parkin* v. *Radcliffe*, *E.* 39 *G.* 3. 1 *B.* & *P.* 393

10. Evidence of a custom for the lord to have the best beast or good on the tenant's death, will not support a justification by him for taking the best beast. *Adderly* v. *Hart*, *T.* 4 *G.* 1. 1 *B.* & *P.* 394 *in notis.*

11. To debt for an escape, Defendant pleaded

pleaded a voluntary return and safe keeping since; Plaintiff in his replication admitted the voluntary return, but alleged that afterwards, and after notice of the escape, the prisoner escaped again; this the Defendant traversed: held that it was not sufficient for the Plaintiff merely to prove a notice of escape, and subsequent escape, but that he must also, in order to maintain the action, prove the first escape alleged in his declaration. *Griffiths* v. *Eyles*, *E.* 39 *G.* 3.
1 *B.* & *P. page* 418. *n.*

12. Evidence that the parishioners have treated with the proprietor of tithes for a composition is not sufficient to establish his possession of the tithes in an action on the 2 & 3 *Ed.* 6. *c.* 13. *Wyburd* v. *Tuck*, *T.* 39 *G.* 3. 1 *B.* & *P.* 458

13. If a Plaintiff's attorney previous to bringing an action for a distress under the warrant of a magistrate make out two papers precisely similar, purporting to be demands of a copy of the warrant pursuant to the 24 *G.* 2. *c.* 44. *s.* 6. and sign both for his client, and then deliver one to the Defendant, the other will be sufficient evidence at the trial. *Jory* v. *Orchard*, *M.* 40 *G.* 3. 2 *B.* & *P.* 39

14. If *A.* agree to acknowledge an old warrant of attorney given by him "so as to enable *B.* to enter up judgment thereon," judgment may be entered up under a Judge's order without an affidavit of the subscribing witnesses. *Laing* v. *Raine*, *H.* 40 *G.* 3. 2 *B.* & *P.* 85

15. A copy of an attorney's bill, the original of which has been delivered to the Defendant, may be admitted in evidence without proof of notice to produce the original. *Anderson* v. *May*, *T.* 40 *G.* 3.
2 *B* & *P. page* 237

16. And is conclusive as to the reasonableness of the items. *ibid.*

17. If a bill of particulars state the Plaintiff's demand to be for goods sold and delivered to the Defendant, no evidence can be received of goods sold by the Defendant as agent of the Plaintiff. *Holland* v. *Hopkins*, *T.* 40 *G.* 3. 2 *B.* & *P.* 243

18. Evidence to the character of a Defendant is not admissible upon the trial of an information in the Exchequer for penalties. *The Attorney General* v. *Bowman*, *Sittings at Westminster*, *coram Eyre*, Ch. B. 16th *June* 1791.
2 *B.* & *P.* 532 *in not.*

19. If a Defendant give in evidence an answer in Chancery of the Plaintiff it will not entitle the Plaintiff to avail himself of any matters contained in such answer, which are only stated as hearsay. *Semb. Roe d. Pellatt* v. *Ferrars*, *M.* 42 *G.* 3. 2 *B.* & *P.* 542

20. No parol evidence can be received to explain an agreement in which there is no latent ambiguity. (See Agreement, 1, 2.) *Coker* v. *Guy*, *M.* 42 *G.* 3. 2 *B.* & *P.* 565

21. *A.* devised his estates at *Lushill* in the county of *Wilts*, and *Hearne* and *Buckland* in the county of *Kent*, "to his son in fee;" at the time of the devise *A.* had lands in the parish of *Hearne*, and also in the several parishes of *C.*, *W.*, *S.*, *R.*, and *S.*, all which he purchased by one contract of one person and used

used to call his "*Hearne* estate," or "*Hearne Bay* estate," the estate at *Lushill* in *Wilts*, and also a farm called *Buckland* farm in *Kent*, were sold before the testator's death, and at the time of his death he had no estate in *Kent*, except that which lay in the parishes of *Hearne*, *C.*, *W.*, *S.*, *R.*, and *S.* *Qu.* Whether the above facts were admissible in evidence to shew that the testator intended to pass the land in the several parishes of *C.*, *W.*, *S.*, *R.*, and *S.*, as well as that in the parish of *Hearne*? *Whitbread* v. *May*, *M.* 42 *G.* 3.
2 *B.* & *P. page* 593

22. In trover for the certificate of a ship's registry, the certificate may be proved by the production of the registry, from which it was copied, though no notice has been given to produce the certificate itself. *Bucher* v. *Jarratt*, *E.* 42 *G.* 3.
3 *B.* & *P.* 143

23. The prison books of the Fleet and King's Bench prisons, though admissible evidence to prove the period of the commitment and discharge of a prisoner, are not admissible to prove the cause of his commitment. *Salte* v. *Thomas*, *T.* 42 *G.* 3. 3 *B.* & *P.* 188

24. Policy of insurance on a ship warranted *American*. To negative this warranty a sentence of condemnation of a *French* court at *St. Domingo* was given in evidence, which began thus: "Condemnation of the *English* ship *Mount Vernon*. Extracted from the books of the office of the provisional tribunal respecting prizes established at *St. Domingo*, We *F. P.* Judge," &c.: and after stating that the circumstances of papers having been thrown overboard, the captain and supercargo having abandoned the ship, the captain being a *Portuguese*, without a certificate of his naturalization, and the United States in their last treaty with *England*, having suffered to be added to the articles which had before been considered as contraband of war, staves, &c. were sufficient motives to condemn the said ship, condemned the same as property belonging to the captor. Held, that this sentence was conclusive evidence that the ship was not *American*. *Baring* v. *Clagett*, *T.* 42 *G.* 3. 3 *B.* & *P. page* 201

25. In an action for an escape out of execution, the declaration alleged that the prisoner was, by *habeas corpus*, brought before a Judge of K. B., and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon now remaining in the said court more fully appears." Held, that evidence of a commitment by a Judge of K. B. but not filed of record, would not support the action. *Turner* v. *Eyles*, *T.* 43 *G.* 3.
3 *B.* & *P.* 456

26. Held also, that the above allegation (even if unnecessary) must be proved as laid. *ibid.* *ibid.*

27. Policy of insurance on goods on board the *Catharine*, an *American* vessel. After the policy was effected doubts having arisen, whether the policy contained a warranty,

ranty, the underwriters signed an agreement, that in case of capture or seizure, the assured, before they claimed for a loss, must produce proofs of the ship being *American* bottom, and by bills of lading shew that the cargo had been shipped on account and risk of *A. B.*, upon which they would settle by granting bills at four months for the amount of their subscriptions, in full dependance that the insured would use their best endeavours to recover the property as for account of the shippers. Held, that on proof being produced that the ship was *American* bottom, and the cargo shewn by bills of lading to have been shipped on account and risk of *A. B.*, the assured were entitled to recover, on a loss by capture, notwithstanding the production by the underwriters of any *French* sentence of condemnation to falsify the warranty. *Lothian* v. *Henderson*, *T.* 43 *G.* 3.

3 *B. & P. page* 499

28. A sentence of condemnation in a *French* court of admiralty is admissible evidence in an action here between the assured and the underwriters of a policy of insurance containing a warranty of neutrality. *ibid. ibid.*

29. It seems that the sentence of a foreign court of admiralty condemning a ship warranted neutral, in which the consideration leading to the judgment proceeds on the want of a document not required by the law of nations, but which adjudges "lawful prize all the goods and effects which compose the cargo of the said ship, since the whole, owing to the captain not being provided with proper and regular dispatches and papers, is to be deemed the property of the enemies of the *French* Republic," is conclusive evidence against the warranty of neutrality. *Lothian* v. *Henderson*, *T.* 43 *G.* 3.

3 *B. & P. page* 199

30. Upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner in order to prove his knowledge of the forgery. *Rex* v. *Wylie*, *T.* 44 *G.* 3. 1 N. R. 92

31. In an action on the statute for usury in discounting a bill, it was proved that one *B.* demanded payment of the acceptor, and commenced an action against him, and afterwards received the amount of the bill and the costs of those proceedings on producing the bill, and gave a receipt as attorney for the present Defendant; this without further evidence of *B.* being the agent of the Defendant, and without the production of the proceedings against the acceptor, was held good *primâ facie* evidence to be left to a jury of the Defendant having received the usurious interest. *Owen* v. *Barrow*, *M.* 45 *G.* 3.

1 N. R. 101

32. Action for these words spoken by Defendant of the Plaintiff in his profession of a physician: "Dr. *S.* has upset all we have done, and die he (the patient) must." It was proved that the Plaintiff

Plaintiff had practised several years as a physician, and having been called in during the absence of a physician, who, with the Defendant, attended the patient, the Defendant as apothecary made up the medicines prescribed by the Plaintiff for the patient in question. *Quære*, Whether, on this declaration, it was necessary for the Plaintiff to produce his diploma, or other direct evidence that he had taken a degree in physic, in order to maintain the action; the Court being equally divided. *Smith* v. *Taylor*, *H.* 45 *G.* 3.
1 N. R. *page* 196

33. In an action on 32 *G.* 2. *c.* 28. for penalties against a sheriff's officer for taking a larger fee upon an arrest than is allowed by law, the Plaintiff must prove the sum allowed by law, the stat. 23 *Hen.* 6. *c.* 9. not being the rule: and the Court will not set aside a nonsuit grounded on the want of such evidence, in order to enable the Plaintiff to recover the excess under the money counts, since he might have obtained the redress by summary application. *Martin* v. *Slade*, *M.* 46 *G.* 3. 2 N. R. 59

34. A forged bill was found upon *A.* who then resided in *Wiltshire*, and had resided there about a year under a false name, but which bill bore date at a time when *A.* lived in *Somersetshire*, in the neighbourhood of the person whose signature was forged, and more than two years previous to the bill being found upon him. On an indictment against *A.* for forgery of the note in *Wiltshire*, this was held not to be sufficient evidence of the offence having been committed in that county. *Rex* v. *Crocker*, alias *Collins*, *M.* 46 *G.* 3. 2 N. R. *page* 87

35. If an insured declare upon a total loss by capture, and after proving a capture shew a re-capture, upon which proceedings were had in an admiralty court, he cannot recover without proving the proceedings in the admiralty court under seal, though he only claim the amount of the loss sustained by the salvage, proceedings and sale. *Thellusson and Others* v. *Shedden*, *T.* 46 *G.* 3 2 N. R. 228

36. The judgment book is no evidence of the judgment entered therein, though the record has not been made up, and though the person interested in proving the judgment be no party to the action. *Ayrey* v. *Duxenport*, *T.* 47 *G.* 3.
2 N. R. 474

37. If a ship warranted neutral be condemned as prize by a *French* Court of Admiralty, and a Court of appeal afterwards reverse such sentence, but refuse to give damages or costs on account of the muster roll not expressing the place of nativity of the crew according to an ordinance of *France*, and it be proved that the ship was otherwise properly documented as a neutral, the assured may recover for the detention notwithstanding such refusal of the Court of appeal to allow damages or costs. *Siffken* v. *Lée*, *T.* 47 *G.* 3. 2 N. R. 484

III. *Of Stamps.*

1. If at the bottom of an unstamped draft (not within the exception of the 23 *G.* 3. *c.* 49. *s.* 4.) there be an acknowledgment of the drawee, that

that a third person paid it for him, that acknowledgment cannot be received in evidence; because if received, it would give effect to the draft. *Castleman* v. *Ray*, *E.* 41 *G.* 3. 2 *B.* & *P. page* 383

2. If a parol warranty and agreement to assign be reduced into writing, but not stamped, and the assignment be afterwards legally executed, the warranty cannot be proved by parol. *Hodges* v. *Drakeford*, *E.* 45 *G.* 3. 1 N. R. 270

EXCHANGE,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 17.

EXCHEQUER BILLS,

See EMBEZZLEMENT.

EXCHEQUER CHAMBER, COURT OF,

See INTEREST OF MONEY, No. 2. 4, 5.

1. The Court of Exchequer Chamber will allow interest to a Defendant in error under 3 *H.* 7. *c.* 10. on a judgment of *non pros*, as well as on a judgment of affirmance. *Sykes* v. *Harrison in Error*, *E.* 37 *G.* 3. 1 *B.* & *P.* 29

2. For the future the interest allowed will be 5*l.* per cent. instead of 4*l.* *ibid.* 30

3. Where judgment for the Defendant on a special verdict is reversed in the Exchequer Chamber that Court on motion will give a final judgment for the Plaintiff. *Denn ex dem. Mellor* v. *Moore in Error*, *E.* 37 *G.* 3. 1 *B.* & *P.* 30

EXCISE,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 12. HABEAS CORPUS, No. 2.

1. An Excise officer seizing soap in the execution of his office at any distance from the sea, is within the protection of 24 *G.* 3. *Sess.* 2. *c.* 47. *s.* 15. *The King* v. *Brady and others*, *M.* 38 *G.* 3. 1 *B.* & *P. page* 187

2. Nor need he have a warrant to seize the soap in transitu, if liable to forfeiture. *ibid. ibid.*

EXECUTION,

See ATTORNEY, No. 3, 4. BAIL, ii. 21. BARON AND FEME, No. 9. EXECUTOR AND ADMINISTRATOR, No. 1. JUDGMENT. PARTNERS, No. 4, 5. PRACTICE, vi. x. 6. PRISONER, No. 1, 2, 3. 7. 9. TRESPASS, No. 2, 3. VENDITIONI EXPONAS.

1. An attachment for non-payment of money is an execution. *The King* v. *Davis*, *One*, &c. *M.* 39 *G.* 3. 1 *B.* & *P.* 336

2. Where the defendant suffers judgment by default in an action of debt on simple contract, the Plaintiff is not entitled to levy the expences of the execution; notwithstanding those expences, together with the debt and costs of the action, do not exceed the sum confessed upon record. *Thornton* v. *Merredew*, *E.* 43 *G.* 3. 3 *B.* & *P.* 362

3. An equitable interest cannot be taken in execution. *Metcalf and Another* v. *Scholey and Another*, *T.* 47 *G.* 3. 2 N. R. 461

EXECUTOR AND ADMINISTRATOR,

See AFFIDAVIT TO HOLD TO BAIL, No. 14. 24, 25. ASSUMPSIT, No. 1. BAIL, iii. 1. COSTS, ii. PLEADING, i. 3. ii. 5, 6. v. 6.

1. If an executrix use the goods of her testator as her own, and afterwards marry,

marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt. *Quick et Ux.* v. *Sir William Staines, Knt. Sheriff, T.* 38 *G.* 3. 1 *B. & P. page* 293

2. An outstanding judgment against a testator or intestate not docketted according to the directions of the 4 *& 5 Will. & Mary, c.* 20. cannot be pleaded by an executor or administrator to an action on simple contract. *Steel* v. *Rorke Administratrix, T.* 38 *G.* 3. 1 *B. & P.* 307

3. The administratrix of an executor cannot sue for the double value of lands held over after a notice to quit under a demise from the testator contrary to the 4 *Geo.* 2. *c.* 28. without taking out administration *de bonis non. Tingrey, Widow,* v. *Brown, T.* 38 *G.* 3. 1 *B. & P.* 310

4. Even though the tenant has attorned to her. *ibid. ibid.*

5. *Qu.* Whether an executor can maintain trespass for trees cut down in the lifetime of his testator? *Williams, Executor,* v. *Breedon, M.* 39 *G.* 3. 1 *B. & P.* 329

6. If the obligee in a joint and several bond make one of two obligors his executor with others, the action on the bond is discharged as to both obligors. *Cheetham* v. *Ward, H.* 37 *G.* 3. 1 *B. & P.* 630

7. The authority of an administrator appointed according to the provisions of 38 *Geo.* 3. *c.* 87. during the absence of an executor from this country, does not become actually void upon the death of such executor, but only voidable. *Taynton* v. *Hannay, H.* 42 *Geo.* 3. 3 *B. & P. page* 26

8. Debt does not lie against an administrator upon a simple contract of his intestate. *Barry* v. *Robinson, T.* 45 *G.* 3. 1 N. R. 293

EXTINGUISHMENT,

See EXECUTOR AND ADMINISTRATOR, No. 4. WAY, RIGHT OF, No. 1.

EXTORTION,

See BOND, No. 4, 5, 6. EVIDENCE, ii. 27.

If by abuse of the process of one of the Courts at *Westminster*, a sheriff's officer extort a promissory note from a suitor, and then declare upon that note in another of the Courts at *Westminster*, the latter Court cannot interfere summarily to punish the officer under the 32 *Geo.* 2. *c.* 28. *s.* 11. *Ex parte Evan Evans, H.* 40 *Geo.* 3. 2 *B. & P.* 88

F.

FACTOR,

See BILLS OF EXCHANGE, No. 3. CONSIGNMENT. LIEN, No. 9. MONEY HAD AND RECEIVED, No. 1. PARTNERS, No. 1, 2.

FALSE CHARACTER,

See ACTION ON THE CASE, No. 5. 7. DEFAMATION, No. 2.

FALSE RETURN,

See ESCAPE, No. 3.

FELONY,

See BURGLARY. EMBEZZLEMENT. EVIDENCE, i. 2. ii. 30. 34. FORGERY. INDICTMENT. LARCENY. POST OFFICE.

FEME COVERT,

See BAIL, i. 2. BARON AND FEME. FINE, No. 7. POWER.

FILAZER,

See BAIL, i. 22. ii. 7, 8.

FINE,

See ACTIONS PERSONAL. AFFIDAVIT, No. 4. AMENDMENT, No. 8. COMMON RECOVERY, No. 4. DEVISE, ii. 8. iii. 4. DOWER.

1. No fine which appears to have been acknowledged more than 12 months, can pass the king's silver office, without a rule of Court or Judge's order. *Reg. Gen. E.* 36 *G.* 3. 1 *B. & P. page* 530
2. In such case, if the conusors be living, an affidavit must be made thereof. *ibid. ibid.*
3. If dead, the affidavit must state the time of their death. *ibid. ibid.*
4. And the application for a rule or order that the fine may pass the king's silver office shall be made to the Court on motion, if in term time, if in vacation to a Judge at chambers; and the rule or order must be filed with the præcipe and concord at the king's silver office. *ibid. ibid.*
5. The Court refused to amend a fine passed two years back, by altering the surnames of the Deforciants, though it was sworn that a wrong name had been inserted by mistake. *Ex parte Motley et Ux. T.* 41 *Geo.* 3. 2 *B. & P. page* 455
6. If under a *dedimus potestatem* to take the acknowledgment of nine persons to a fine, the commissioners take the acknowledgment of six on one piece of parchment, and of three on another, the Court will not allow the fine to pass. *Balch* v. *Phelps, E.* 43 *Geo.* 3. 3 *B. & P.* 366
7. Where the estate of a married woman has been regularly sold with the consent of her husband, the conveyance executed by him, and the purchase-money paid, the Court of *C. B.* will not prevent the wife from levying a fine because her husband has since become *non compos*. *Stead* v. *Izard, T.* 45 *Geo.* 3. 1 N. R. 312

FINES,

See COPYHOLD, No. 2.

FISHERY,

See SEA-SHORE.

FOREIGN LAWS.

If a Defendant be held to bail in this country on an instrument entered into in *France*, by which instrument his property only, and not his person, was, according to the law of *France*, made liable, the Court on motion will discharge him on his entering a common appearance. *Melan* v. *The Duke de Fitzjames, M.* 38 *G.* 3. 1 *B. & P.* 138

FOREIGNER,

See COSTS, iii. 1, 2.

FORESTALLING.

Declaration stated that *H. S.* being possessed of land, on which hops were growing, agreed to sell to *F. W.* all the hops then growing on the said land at 10*l. per cwt.* to be paid by *F. W.* to *H. S.*, to be delivered in pockets by the said *H. S.* to *F. W.* at *Whitstable* in *Kent;* that in consideration that *F. W.* undertook to accept and pay for the hops, *H. S.* promised to deliver them at the place and manner aforesaid in a reasonable time next after they should be picked and gathered; that the hops were picked and gathered, and amounted to 2 *cwt.*, and although a reasonable time for delivery had elapsed, and although said *F. W.* was during that time and afterwards ready and willing to accept and pay for the hops at the rate and in manner, &c. yet *H. S.* had not delivered them. Held, that the sale of hops growing on the land was not illegal, it not being averred that they were bought to sell again. *Bristow and Others, Executors &c.* v. *Waddington and Others, in Error, M.* 47 *G.* 3.
2 N. R. *page* 355

FORFEITURE,

See COVENANT, No. 9. EJECTMENT, No. 7. SEAMAN'S WAGES, No. 1. 6, 7.

FORGERY,

See EVIDENCE, i. 2. ii. 30. 34. PRACTICE, iv. 6.

If *A.* deliver to *B.* a forged bank note to be put off by the latter, this is a "disposing of and putting away" by *A.* within the 15 *G.* 2. c. 13. *s.* 11. *The King* v. *Palmer, T.* 44 *G.* 3. 1 N. R. *page* 96

FRANKING.

A Roman Catholic peer is not entitled to frank. *Lord Petre* v. *Lord Auckland, E.* 40 *G.* 3.
2 *B.* & *P.* 139

FRAUD,

See ASSIGNMENT. BANKRUPT, iii. 7. 9. DECEIT. FRAUDS, STATUTE OF. PAYMENT OF MONEY INTO COURT, No. 4. PLEADING, iii. 1. TITLE.

FRAUDS, STATUTE OF,

See ACTION ON THE CASE, No. 7.

1. On a motion for a new trial by a Defendant, in an action against him for goods delivered to the use of a third person, on his undertaking to see the Plaintiff paid, the Court will take into consideration, not only the expressions used, but the particular situation of the Defendant at the time of his undertaking, and the amount of the sum for which he will thereby be made liable. *Keate* v. *Temple, M.* 38 *G.* 3. 1 *B.* & *P.* 158
2. A sale of lands, though by auction, is within the statute of frauds, and therefore no action can be maintained upon it without a memorandum in writing. *Walker* v. *Constable, T.* 38 *G.* 3. 1 *B.* & *P.* 306
3. If *A.* agree with *B.* to let him land rent free, on condition that *A.* shall have a moiety of the two succeeding crops, the agreement need not be in writing

writing under the statute of frauds. *Semb. Poulter* v. *Killingbeck*, *E.* 39 *G.* 3. 1 *B.* & *P. page* 397

4. A bill of parcels in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of a contract within the statute of frauds. *Saunderson* v. *Jackson*, *T.* 40 *G.* 3. 2 *B.* & *P.* 238

5. At all events a subsequent letter, written and signed by the vendor, referring to the order, may be connected with the bill of parcels so as to take the case out of the statute. *ibid. ibid.*

6. *A.* having sent to *B.* a bale of sponge under a verbal order from the latter, for which he charged 11*s.* per pound: *B.* returned it, and at the same time wrote a letter to *A.* stating that he had examined the sponge, and finding that it was not worth more than 6*s.* per pound, he had sent it back. Held, that this letter did not amount to such an acceptance of the goods as would take the case out of the statute of frauds. *Kent* v. *Huskinson*, *M.* 43 *G.* 3. 3 *B.* & *P.* 233

7. *A.* being insolvent, a verbal agreement was entered into between several of his creditors and *B.*, whereby *B.* agreed to pay the creditors 10*s.* in the pound in satisfaction of their debt, which they agreed to accept, and to assign their debts to *B.* Held that this agreement was not within the statute of frauds, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts. *Anstey* v. *Marden*, *M.* 45 *G.* 3. 1 N. R. *page* 124

8. A note or memorandum in writing of a contract for the sale of goods signed by the seller only, is not a sufficient memorandum within the meaning of the statute of frauds. *Champion*, v. *Plummer*, *E.* 45 *G.* 3. 1 N. R. 252

FRAUDULENT CONVEYANCE.

The goods of *A.* being taken in execution and put up to sale, *B.* became the purchaser, and took a bill of sale of the sheriff, but permitted *A.* to continue in possession; *A.* then executed another bill of sale of the same goods to *C.* a creditor, under which the latter took possession; whereupon *B.* brought an action against *C.* for the goods. Held, that the first bill of sale was valid, and that *B.* was therefore entitled to recover. *Kidd* v. *Rawlinson*, *H.* 40 *G.* 3. 2 *B.* & *P.* 59

FREIGHT,

See AGREEMENT, No. 4, 5. INSURANCE, ii. 14. 16. iii. 5. PLEADING, iv. 7. v. 28.

1. A ship bound for *London*, after taking in her cargo, but before breaking ground, was cut out of her port of lading in *Jamaica* by a *French* privateer, but was afterwards recaptured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty for the benefit of the freighters: held, that the owners of the ship were not

not entitled to any part of the freight. *Curling* v. *Long*, *H.* 37 *G.* 3. 1 *B. & P. page* 634
2. Though by the usage of the trade, the ship was loaded at the expence of the owners. *ibid. ibid.*
3. For freight commences from breaking ground. *ibid. ibid.*

G.

GAMING.

The 9 *Ann.* c. 14. which avoids all securities for goods or money lent at unlawful games, and gives the loser a power to recover back the same, within three months, does not make the contract void, but voidable only, and therefore the loser cannot recover them after three months, though the winner can shew no title to them except what arises from having won them at play. *Vaughan* v. *Whitcomb*, *E.* 47 *G.* 3. 2 N. R. 413

GAOLER,

See HABEAS CORPUS, No. 1, 2. INSOLVENT, 16.

GAVELKIND.

1. A rectory in *Kent*, formerly belonging to one of the dissolved monasteries, having been granted by *Hen.* 8. to a layman to be holden in fee by knights' service *in capite*; held, that the lands were descendible according to the custom of Gavelkind. *Doe d. Lushington* v. *Bishop of Llandaff and Others*, *T.* 47 *G.* 3. 2 N. R. 491
2. But the tithes according to the common law. *ibid. ibid.*

GOODS SOLD AND DELIVERED,

See CONSIGNOR AND CONSIGNEE. PAYMENT OF MONEY INTO COURT, No. 6.

1. If goods be bought to be paid for by a bill at two months, and the vendor accordingly draw upon the vendee for the value, who refuses to accept. *Semb.* that the vendee cannot be sued in an action for goods sold and delivered, but upon the special contract only. *Dutton* v. *Solomonson*, *M.* 44 *G.* 3. 3 *B. & P. page* 582
2. But certainly he cannot be sued in that form of action till after the expiration of the two months. *ibid. ibid.*
3. If goods be sold at two months' credit to be paid for by a bill at 12 months, and the goods be not paid for at the expiration of the 14 months, the vendor may recover in an action for goods sold and delivered. *Brook* v. *White*, *T.* 45 *G.* 3. 1 N. R. 330

GRANT,

See COPYHOLD, No. 1.

A. granted to *B.* his heirs and assigns, occupiers of certain houses abutting on a piece of land about 11 feet wide, which divided those houses from a house then belonging to *A.*, the right of using the said piece of land as a foot or carriage way; and gave him "all other liberties, powers and authorities, incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage:" held, that under these words *B.* had a right

right to put down a flag-stone in this piece of land in front of a door opened by him out of his house into this piece of land. *Gerrard, Assignee, &c.* v. *Cooke, H.* 46 *G.* 3. 2 N. R. *page* 109

GREENWICH HOSPITAL,
See SEAMAN'S WAGES, No. 2, 3. 5.

GUARANTY,
See PLEADING, v. 29.

1. If *A.* become bound to *B.* for the honesty of *C.* who embezzles money, *B.* may maintain an action on the guaranty, though three years have elapsed without any notice having been given of the embezzlement by *B. Peel* v. *Tatlock, E.* 39 *G.* 3. 1 *B. & P.* 419
2. At least if *A.* was acquainted with the circumstances from any other quarter, and *B.* does not appear to have concealed it from him industriously. *ibid. ibid.*
3. *A.* will not be discharged from his guaranty though *B.* appear to have given credit to *C.* for the amount of the sum embezzled. *ibid. ibid.*

GUARDIAN,
See BASTARD.

H

HABEAS CORPUS,
See BASTARD. EVIDENCE, ii. 25, 26. LUNATIC, No. 3.

1. Service of a demand of a copy of the commitment on the turnkey of a prison, is not sufficient to support an action against the gaoler for the penalty incurred by him under the *habeas corpus* act for not delivering the copy to the prisoner, within due time after demand made, if the gaoler himself were within the prison. *Huntley* v. *Luscombe, M.* 42 *G.* 3. 2 *B. & P. page* 530
2. *Qu.* Whether a commitment in execution for a penalty on conviction before a magistrate for an offence against the excise laws be a commitment for "a criminal matter," within the provisions of the *habeas corpus* act, so as to entitle a prisoner to an action against the gaoler for not delivering a copy of the commitment within a certain time after demand made. *ibid. ibid.*
3. The Court of *C. B.* will not grant a *habeas corpus* to bring up a prisoner in custody upon a criminal matter, in order to have him charged with a declaration in a civil action. *Walsh* v. *Davies, T.* 46 *G.* 3. 2 N. R. 245

HERIOT,
See CUSTOM, No. 1. EVIDENCE, ii. 9, 10. PLEADING, iii. 7.

HIGHWAYS,
See REPLEVIN, No. 6.

HOLLAND,
See BAIL, i. 1.

HOPS,
See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 11. FORESTALLING.

STALLING. MONEY HAD AND RECEIVED, No. 5. PLEADING, v. 38. STAMPS, No. 5. TITHES, No. 4.

HORSE-RACE,
See VARIANCE, No. 9. WAGER.

HOUSE-TAX,
See TAXES.

HUSBAND AND WIFE,
See BARON AND FEME.

I.

ILLEGAL CONTRACT,
See ARBITRATION, No. 9. BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 11. MONEY HAD AND RECEIVED, No. 1, 2, 3. 5. 7. TREATING.

1. Plaintiff was employed to wash clothes for Defendant, who was a prostitute, knowing her to be such: held, that the use, however immoral, to which the clothes might be applied, could not bar Plaintiff of an action for work and labour. *Lloyd* v. *Johnson*, *M.* 39 *G.* 3.
1 *B. & P. page* 340

2. But to an action for the use and occupation of a lodging, proof that the lodging was let to the Defendant for the purposes of prostitution, with knowledge on the part of the Plaintiff of that fact, is a sufficient bar. *Crisp* v. *Churchill*, *E.* 34 *G.* 3.
cited *page* 340

3. To debt on bond, Defendant pleaded that the bond was given to secure payment of the price of goods agreed to be sold and delivered in *London* by Plaintiff to Defendant, to be by the latter shipped for *Ostend*, and from thence re-shipped for the *East Indies*, and there trafficked with clandestinely: held a sufficient bar to the action, the case being within 7 *G.* 1. c. 21. which avoids all contracts for supplying cargoes to foreign ships in such a trade. *Lightfoot* v. *Tenant*, *M.* 37 *G.* 3.
1 *B. & P. page* 551

4. Money paid by one of two partners for the other, on account of losses incurred by them on partnership insurances, cannot be recovered in an action brought by him against the other partner. *Aubert* v. *Maze*, *H.* 41 *G.* 3.
2 *B. & P.* 371

5. And if this, with other causes of dispute between the two, be referred to an arbitrator who awards a sum due from one to the other, the Court will set aside that part of the award. *ibid. ibid.*

ILLEGAL TRADE,
See BANKRUPT, i. 2. ILLEGAL CONTRACT, No. 3. INSURANCE, i. 14. ii. 6. 20. iv. 2. LARCENY. PRIZE, No. 1.

IMPARLANCE,
See AID PRAYER, No. 2. PRACTICE, v. 11, 12.

IMPRISONMENT,
See ARREST, No. 2.

INCLOSURE ACT,

See BOND, No. 4, 5, 6.

If an act of parliament for inclosing and allotting the common and waste lands of a parish through which a navigable river flows, empower commissioners to set out such public and private roads and ways as they should think necessary, and direct that all roads and ways not so set out shall be deemed part of the lands to be allotted, an ancient towing path on the bank of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction. *Simpson* v. *Scales*, *T.* 41 *G.* 3. 2 *B.* & *P. page* 496

INCORPORATION,

See CONDITION, No. 3.

INDEBITATUS ASSUMPSIT,

See BARON AND FEME, No. 13. PLEADING, i. 1. v. 33. 36. SALVAGE.

INDEMNITY,

See BOND, No. 4. PLEADING, iii. 9.

INDEMNITY BOND,

See CONDITION, No. 3. RELEASE, No. 1.

INDIA,

See EAST INDIA COMPANY, No. 1. INSURANCE, i. 14. SUBJECT, No. 1, 2. TRADE, No. 1, 2.

A. captain of an *East India* country trader, contracts in *India* with *B.* for a crew according to the custom of the country; *A.* arrives in *England* with the crew, and then makes a voyage with them to the *West Indies*, and back again; whereupon part of the crew bring an action for wages due on the *West India* voyage: held on motion for a *mandamus* to examine witnesses in the *East Indies* that the cause of action did not arise in the *East Indies* within the 13 *Geo.* 3. *c.* 63. *s.* 44. *Francisco* v. *Gilmore*, *M.* 38 *Geo.* 3. 1 *B.* & *P. page* 177

INDICTMENT,

See BURGLARY. CERTIORARI. EMBEZZLEMENT. EVIDENCE, i. 2. ii. 30. 34. FORGERY. PRACTICE, vii. 2.

1. In an indictment on the 37 *G.* 3. *c.* 70. it is sufficient to charge an endeavour to seduce a soldier from his allegiance, and to incite him to mutiny, &c. without specifying the means employed. *The King* v. *Fuller*, *M.* 38 *G.* 3. 1 *B.* & *P.* 180
2. Upon a charge that *A.* endeavoured to incite *B.* being a soldier, to mutiny, knowledge of *B.*'s being a soldier is implied. *ibid. ibid.*
3. And the word "advisedly," if used in such a case, is equivalent to *scienter*. *ibid. ibid.*
4. It seems that if one endeavour comprise two separate offences, a count in an indictment charging that endeavour may contain those two offences. *ibid. ibid.*
5. In an indictment on the 15 *Geo.* 2. *c.* 28. *s.* 3. it is not necessary to aver that the Defendant is a common utterer of false money. *The King* v. *Smith*, *E.* 40 *Geo.* 3. 2 *B.* & *P.* 127
6. In an indictment on the 39 *Geo.* 3. *c.* 85. against a servant for embezzling

zling money received on his master's account, it is not sufficient to follow the words of the statute, but there must be a positive allegation, that the money was the property of the master, as in the case of larceny. *The King* v. *M'Gregor, H.* 42 *G.* 3.
3 *B. & P. page* 106

7. If a servant receive money for his master in the county of *A.*, and being called upon to account for it in the county of *B.*, there deny the receipt of it, he may be indicted for the embezzlement in the latter county. *The King* v. *Taylor, Old Bailey Sessions after M.* 44 *G.* 3. 3 *B. & P.* 596

INFANT,

See BAIL, i. 14. BASTARD, TRUSTEE, No. 1, 2.

INFORMATION,

See EVIDENCE, ii. 18.

INFORMER,

See ATTORNEY, No. 5.

INQUIRY, WRIT OF,

See BAIL, ii. 6. PRACTICE, iv.

At the execution of a writ of inquiry after judgment on demurrer, it is not competent to the Defendant to controvert any thing but the amount of the sum in demand. *De Gaillon* v. *V. H. L'Aigle, H.* 39 *Geo.* 3. 1 *B. & P.* 368

INSOLVENT,

See FRAUDS, STATUTE OF, No. 7. JUDGMENT, No. 1. PRISONER.

1. A prisoner in execution in an action in the *Tholsey* Court at *Bristol*, having been moved by *habeas corpus* to the *Fleet*, was discharged under the Lord's Act, by the Court of Common Pleas. *Haskins* v. *Morris, M.* 38 *G.* 3.
1 *B. & P. page* 92

2. An order for the discharge of an insolvent under the Lord's Act, *s.* 16. cannot be made by a Judge in term time, though summonses were taken out in vacation, and the order only delayed till the beginning of term by an irregularity in the affidavit. *ibid. ibid.*

3. If a prisoner brought up to be discharged under *s.* 16. of the Lord's Act deliver in a false schedule and be remanded, the Court will not at the instance of a creditor order him to be brought up a second time for the purpose of amending his schedule, and assigning over that property which he had before concealed. *Hutchins* v. *Hesketh, M.* 38 *Geo.* 3. 1 *B. & P.* 143

4. Even though the prisoner consent, *ibid. ibid.*

5. A note for securing the weekly allowance to a prisoner under the Lord's Act need not be stamped. *Bowring* v. *Edgar, E.* 38 *Geo.* 3. 1 *B. & P.* 270

6. Such a note cannot be signed by the creditor's attorney if his client be dead. *The King* v. *Davis, One, &c. M.* 39 *G.* 3. 1 *B. & P.* 336

7. It

7. It is no objection to a prisoner being discharged under the Lord's Act that his creditor is dead. *The King* v. *Davis, One, &c. M.* 39 *G.* 3. 1 *B. & P. page* 336

8. An attorney in custody on an attachment for not paying over money received by him in the course of a suit, may be discharged under the Lord's Act. *ibid. ibid.*

9. The Court cannot under the words of the 37 *Geo.* 3. *c.* 85. *s.* 2. moderate the sum to be paid to a prisoner on his being remanded, but a note must be signed for the full sum directed by that act. *ib. ib.*

10. A prisoner who is taken in execution for more than 300*l.*, and afterwards reduces his debt below that sum, is not entitled to be discharged under the Lord's Act in the next term after he has so reduced his debt, unless it be also the next term after he was taken in execution. *Ex parte Hubbard, E.* 39 *Geo.* 3. 1 *B. & P.* 423

11. The Court of Chancery having refused to discharge a prisoner in custody for not putting in an answer unless on payment of the fees, he applied to *C. B.* to be discharged under the insolvent act, 34 *Geo.* 3. *c.* 69., but was refused, his contempt not consisting in the non-payment of money. *Ex parte Benjamin Lawrence, E.* 36 *Geo.* 3. 1 *B. & P.* 477

12. If a note for payment of the allowance to a prisoner under the Lord's Act be dated on a *Saturday* and delivered on a *Monday*, and contain a general promise to pay the allowance weekly, the prisoner is entitled to be discharged. *Constantine* v. *Pugh, T.* 42 *G.* 3. 3 *B. & P. page* 184

13. *Qu.* Whether such a note ought not to contain an express promise to pay the allowance on a *Monday*, although it be dated on that day of the week. *ibid. ibid.*

14. The profits of an ecclesiastical benefice do not pass to the assignees under an insolvent act, though included in the schedule of the insolvent. *Arbuckle* v. *Cowtan, H.* 43 *Geo.* 3. 3 *B. & P.* 321

15. An insolvent discharged under the 41 *Geo.* 3. *c.* 70. cannot be holden to bail on a bill drawn and indorsed over by him previous to the 1st of *March* 1803, though not due till after that period. *Sharpe* v. *Iffgrave, E.* 43 *G.* 3. 3 *B. & P.* 394

16. Payment of the weekly allowance to a prisoner under the Lord's Act, to the person who opens the doors of the prison, is a sufficient payment to the prisoner within the meaning of the act. *Parsons* v. *Solomon, M.* 45 *G.* 3. 1 N. R. 111

17. If a note for the weekly allowance to a prisoner in execution at the suit of a corporation, be sealed with the corporation seal, it is a sufficient compliance with the Lord's Act, which requires it to be signed with the name or mark of the Plaintiff. *Doe d. Cutler's Company* v. *Hogg, T.* 45 *G.* 3. 1 N. R. 306

18. The Court of *C. B.* allowed a prisoner to be brought up under the Lord's Act, notwithstanding the body of the notice contained the words "King's Bench" instead of "Common Pleas," the title having been properly altered

ed from King's Bench to Common Pleas, and there not being a sufficient time to give a fresh notice. *Knight* v. *Fowler*, *M.* 46 *G.* 3. 2 N. R. *page* 67

19. Insolvents shall be brought up in Term on the days appointed for the *London* sittings, and on *Saturdays* only. *Reg. Gen. M.* 46 *G.* 3. 2 N. R. 96

INSURANCE,

See Costs, i. 7. East India Company, No. 2. Evidence, i. 4. ii. 24. 27, 28, 29. 35. 37. Illegal Contract, No. 4. Licence. Payment of Money into Court, No. 8. Pleading, iv. 11. v. 10, 11. 22.

I. *Of the Validity of the Insurance.*
II. *Of the Effect of a valid Insurance.*
III. *Of the Acts of the insured.*
IV. *Return of Premium.*

I. *Of the Validity of the Insurance.*

1. *A.* being indebted to *B.* without any order from him, consigns goods to *C.* to be held for *B.* and indorses the bill of lading to *C.* resolved that *B.* has an insurable interest in the goods so consigned. *Hill and another* v. *Secretan*, *M.* 39 *G.* 3. 1 *B.* & *P.* 315

2. *A.* having consigned a cargo to *B.* and drawn bills on him to the amount of it in favour of *C.* his general agent, sends these bills, together with the bills of lading, to *C.* desiring him to transmit them to B. "that *B.* may have an opportunity of insuring;" he also draws a bill for 300l. on *C.* which is accepted; *B.* refuses to take to the cargo or accept the bills drawn on him; *C.* then effects a policy in his own name, and informs *A.* thereof, who approves of his conduct; in an action by *C.* stating himself in the first count to be the agent of *A.* and averring interest in him, and in the second averring interest in himself, held, first, that the policy was good within the 28 *G.* 3. *c.* 56. *Wolff and others* v. *Horncastle*, *M.* 39 *G.* 3. 1 *B.* & *P. page* 316

3. Secondly, that *C.* had an insurable interest to the amount of 300*l.* *ibid. ibid.*

4. If the name of the broker effecting a policy of insurance be inserted in the policy as agent generally, without saying for whom, it is a sufficient compliance with the 28 *G.* 3. *c.* 56. *Bell and others* v. *Gilson*, *M.* 39 *G.* 3. 1 *B.* & *P.* 345

5. So it is if his name be inserted in the policies though not as agent. *De Vignier* v. *Swanson*, *B. R. M.* 39 *G.* 3. 1 *B.* & *P.* 346 *n.*

6. Goods, the produce of *Holland* purchased in that country during hostilities between *Great Britain* and *Holland*, by a *British* agent resident there, and shipped for *British* subjects, were insured by them in this country: held that this was a legal insurance. *Bell and others* v. *Gilson*, *M.* 39 *G.* 3. 1 *B.* & *P.* 345

7. If *A.* and *B.* declare upon a policy of insurance, and aver that they were interested until and at the time of the loss, and it be proved that *C.*, after the policy effected but before the loss, became a partner with *A.* and *B.* in the goods insured; it seems that the

the variance is not fatal, for the averment of interest relates to the time of making the policy. *Perchard* v. *Whitmore, Guildhall Sittings after Mich. term* 1786, *coram Buller* J. 2 *B. & P. page* 155. n.

8. If a policy be effected on a foreign built ship *British* owned (which not being required to be registered may sail without convoy,) it is not incumbent on the assured to communicate to the underwriter, at the time of making the policy the circumstance of her being foreign built. *Long* v. *Duff*, *T.* 40 *G.* 3. 2 *B. & P.* 209

9. In a declaration on a policy of insurance, the plaintiff averred that Messrs. *H.* at the time of effecting the policy, and at the time of the loss, were interested in the cargo, which was the subject of the insurance "to a large amount, to wit, to the amount of all the money ever insured thereon;" at the trial it appeared that previous to effecting the policy Messrs. *H.* had admitted another mercantile house to a joint concern in the cargo insured: held that the averment was supported by the evidence. *Page* v. *Fry*, *T.* 40 *G.* 3. 2 *B. & P.* 240

10. The Commissioners appointed by the King under 35 *G.* 3. *c.* 80. for the care, sale and management of such ships and cargoes belonging to the subjects of the *United States*, as should be brought into the ports of this kingdom, were held to have an insurable interest in *Dutch* ships on their passage to this country, having been taken by a captain of a *British* man of war, under instructions from the Admiralty to take all ships and cargoes belonging to the subjects of the *United States*, and to bring them into the ports of this kingdom to be detained provisionally. *Lucena* v. *Craufurd*, *H.* 42 *G.* 3. 3 *B. & P. page* 75

11. The opinions of the Judges delivered in *Dom. Proc.* upon eight questions arising out of the above cases, *M.* 47 *G.* 3. 2 N. R. 269

12. *Venire de novo* awarded; and verdict for Plaintiffs below on the count which averred the interest in the Crown. 2 N. R. 329 (*a*)

13. If the owner of a ship warranted *American* be resident in *England*, though a native of *America*, the insurance is void. *Tabbs* v. *Bendelack*, *Guildhall Sittings after T. term* 1801, *coram Lord Kenyon*. 3 *B. & P.* 207 *n.*

14. If a *Swedish* ship be insured at and from her loading port in the *East Indies* to *Gottenburgh*, and part of the cargo be laden in a *British* port in the *East Indies*, the insured cannot recover, the voyage being in contravention of the navigation laws. *Chalmers* v. *Bell*, *H.* 44 *G.* 3. 3 *B. & P.* 604

15. Action on a policy on goods from *Berderygge* to *London*, effected by the consignees on the 13th of *Dec.* without communicating a letter received by them the day before, but dated the 30th of *Nov.* informing them that the Captain would sail the next day, and directing them, if he should not be arrived, to effect the insurance as low as possible; held a material

(*a*) The judgment given for the Plaintiffs in K. B. was affirmed in *Dom. Proc.* in *Trin.* term, 48 *Geo.* 3.

material concealment though the ship did not in fact set sail till the 24th of *December*. *Willes* v. *Glover*, *E.* 44 *G.* 3. 1 N. R. *page* 14

16. In effecting a policy on the 8th of *January* at *Whitehaven*, on a ship "at and from *Barbadoes* to *Liverpool*," a broker's letter was produced, stating that the ship insured was not coppered but a slow sailer; was expected to have sailed on the 28th of *November*; and that the *Barton*, a coppered vessel, and very fleet, which had sailed the 24th from *Barbadoes*, had arrived on the 5th *January*, but no notice was taken of the *Agreeable*, another coppered and fleet vessel, which sailed the 29th *November*, having also arrived on the same day as the *Barton*. After verdict for the Plaintiff, the Court refused to grant a new trial on the ground of concealment. *Littledale* v. *Dixon*, *H.* 45 *G.* 3.
1 N. R. 151

17. An Insurance on the "commission privileges," &c. of the Captain of a ship in the *African* trade is legal. *King* v. *Glover*, *T.* 46 *G.* 3. 2 N. R. 206

II. *Of the Effect of a valid Insurance.*

1. In an insurance on a ship at and from *Hull* to *Bilboa*, warranted to depart from *England* with convoy, the voyage from *Hull* to *Portsmouth*, where she meets with convoy, and from thence to *Bilboa*, may be considered as distinct: and in case of a loss between the two latter places, an apportionment and return of premium may be demanded. *Rothwell* v. *Cooke*, *M.* 38 *G.* 3. 1 *B.* & *P. page* 172

2. In a policy against fire from half a year to half a year, the assured agreed to pay the premium half yearly "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half year, and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid: held that the insurers were not liable, though the assured tendered the premium before the end of fifteen days, but after the loss. *Tarlton* v. *Staniforth in Error*, *E.* 36 *G.* 3.
1 *B.* & *P.* 471

3. Policy on the *Ceres*, "at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coast of *Portugal* to join convoy, particularly at *Lisbon*, at 12 guineas *per cent.* to return six pounds *if she sail with convoy from the coast of Portugal* and arrive;" the *Ceres* sailed from *Oporto* with a sloop and cutter appointed to protect the trade of that place to *Lisbon*, from whence it was to proceed with the *Lisbon* trade, under a larger convoy for *England;* in the way from *Oporto* to *Lisbon* the fleet was dispersed by a storm, and the *Ceres*, judging for the best, ran for *England* and arrived: held that the assured were intitled to a return of premium. *Audley* v. *Duff*, *H.* 40 *G.* 3.
2 *B.* & *P.* 111

4. So

4. So where the words were "if she depart with convoy from *Portugal* and arrive." *Everard* v. *Hollingworth*, *H.* 40 *G.* 3.
2 *B.* & *P. page* 111. *in notis.*
5. Insurance on goods from *A.* to *B.*, "until they should be there discharged and safely landed;" on their arrival at *B.* the merchant to whom the goods belonged employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss. *Hurry* v. *The Royal Exchange Assurance Company*, *E.* 41 *G.* 3.
2 *B.* & *P.* 430
S. P. *Rucker* v. *London Assurance Company*, *Guildhall*, 8th *June* 1784, *coram Buller* J. 2 *B.* & *P.* 432. *n.*
6. Insurance on goods on board a *Spanish* ship from *Nassau* to *Campeachy*, to continue on the goods till discharged and safely landed. The ship having a licence from the *British* governor at *Nassau* sailed from *Campeachy*, and having arrived off that port, made signals for launches to come out, into which the goods were put for the purpose of being run ashore. In this situation the goods were seized by two *Spanish* government brigs, it being contrary to the *Spanish* laws to import *British* goods into the *Spanish* main. It seems that the goods were protected by the policy while on board the launches, such being the usual method of carrying on that trade. *Matthie* v. *Potts*, *H.* 42 *G.* 3. 3 *B.* & *P.* 23
7. Held that the *Dutch* commissioners might recover for a loss by perils of the sea upon shipping insured as *ante Div.* I. No. 10. though the loss did not happen until after a proclamation had issued for general reprisals against the *Dutch*. *Lucena* v. *Craufurd*, *H.* 42 *G.* 3. [But see *Div.* I. No. 10, 11.]
3 *B.* & *P. page* 75
8. An insurance effected in *Great Britain* on a *French* ship previous to the commencement of hostilities between *Great Britain* and *France*, does not cover a loss by *British* capture. *Furtado* v. *Rodgers*, *T.* 42 *G.* 3. 3 *B.* & *P.* 191
9. *Quære.* Whether if a ship be warranted *American*, the assured does thereby undertake that she shall be owned and navigated according to all the regulations of the *American* navigation act? *Baring* v. *Clagett*, *T.* 42 *G.* 3. 3 *B.* & *P.* 201
10. A partial loss on a policy on goods, by reason of sea-damage is to be calculated by ascertaining the difference between the respective gross proceeds of the same goods when found, and when damaged and not the net proceeds. *Hurry* v. *The Royal Exchange Assurance Company*, *M.* 43 *G.* 3. 3 *B.* & *P.* 308
11. If a cargo of a perishable nature be insured from *A.* to *B.* with the usual memorandum, and in the course of the voyage information be received by the master that the port of *B.* is shut against the ships of his nation, in consequence of which the commander of the convoy orders the ship to proceed to another port, and the cargo be sold there by order of the Vice-Admiralty Court for a very small sum of money, the assured cannot abandon

abandon as for a total loss. *Hadkinson* v. *Robinson*, *E.* 43 *G.* 3.
3 *B.* & *P. page* 388

12. It seems that if the voyage be lost in consequence of the port of destination being shut against the ship insured, the assured cannot declare upon this as a loss within the policy. *ibid. ibid.*

13. Policy on fruit from *Cadiz* to *London*, with the usual memorandum. In the course of the voyage the fruit was so much damaged by sea water that it became rotten and stunk, and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also being too much damaged to proceed on the voyage was sold, and the cargo necessarily thrown overboard: held that the assured were entitled to recover for a total loss. *Dyson* v. *Rowcroft*, *T.* 43 *G.* 3.
3 *B.* & *P.* 47

14. Policy on freight valued at 500*l.* on a voyage at and from *Demerara*, *Berbice*, and the Windward and Leeward Islands, to *London*. The ship being at *Demerara*, an agreement was entered into by the master with a house there for a freight from *Berbice* to *London*, the cargo to be put on board at *Berbice*, and the ship to take a cargo of bricks and planks from *Demerara* to *Berbice*, and deliver them there; while proceeding from *Demerara* to *Berbice* with the bricks and planks on board, she met with an accident, and in consequence never earned her freight: held that it was not a loss within the policy. *Sellar* v. *M'Vicar*, *E.* 44 *G.* 3. 1 N. R. *page* 23

15. Policy on goods on board a particular ship from *A.* to *B.*, "against sea risk, and fire only;" in the course of the voyage from *A.* to *B.* the ship was carried out of the course of the voyage by a King's ship, but being afterwards released, she proceeded on the voyage insured, and while so proceeding, the goods insured sustained sea damage: held that the underwriters were liable for this loss. *Scott* v. *Thompson*, *H.* 45 *G.* 3.
1 N. R. 181

16. Policy on the freight of the ship *Stranger*, at and from *London* to *Jamaica* with liberty to touch at *Madeira*, and discharge and take goods on board there, the Plaintiffs had agreed by charter-party that the ship should take in goods at *London*, and proceed to *Madeira*, and there deliver such part of the goods shipped at *London*, as their agent should direct, and receive on board wine and proceed to *Jamaica*, and there deliver; and the freighter agreed to pay 135*l.* in full for freight during the whole voyage from *London* to *Madeira*, and from thence to *Jamaica*; such freight to be paid in *Madeira*, on delivery of the goods shipped at *London* for that place, by *Madeira* wine at 40*l.* per pipe, to be carried in the said ship to *Jamaica* free of freight; the ship arrived at *Madeira* and delivered all her *London* cargo, except 33 casks of coals, which the captain kept on board

board to stiffen the ship; having received part of his cargo for *Jamaica*, but not the wine to be paid for freight, a gale of wind arising, the captain was obliged to cut the cables, and run out to sea, where he was captured: held that the Plaintiff was entitled to recover for a total loss. *Atty* v. *Lindo*, *E.* 45 *G.* 3. 1 N. R. *page* 236

17. Rice is not corn within the meaning of the memorandum of a policy of insurance. *Scott* v. *Bourdillon*, *T.* 46 *G.* 3. 2 N. R. 213

18. In moving a ship from one part of an harbour to another it became necessary to send two of the crew on shore to make fast a new line and cast off the rope by which the ship was made fast; those two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore: held a loss by perils of the sea within the policy. *Hodgson* v. *Malcolm*, *M.* 47 *G.* 3. 2 N. R. 336

19. If a ship, in order to escape from a privateer, carry an unusual press of sail, and succeed in getting away, but sustain damage in so doing, this is a particular, not a general average. *Covington* v. *Roberts*, *M.* 47 *G.* 3. 2 N. R. 378

20. In an action on a policy of Insurance on a ship licensed by the *East India* Company to proceed for one voyage from *England* to the *Cape;* from thence to the *Pacific Ocean* and *North West Coast* of *America*, and there to sell the cargo from *London*, and trade and traffic and procure and afterwards sell the produce or manufacture of those parts, and to proceed from thence to *Japan*, *Korrea*, and *Canton*, and there to dispose of the cargo procured on the *North West Coast* of *America*, and then return to *England*, which licence was to be in force for three years; the Court held, that a ship which was lost in the *Pacific Ocean* after having abandoned all intention of proceeding to *Canton* was protected by the licence. *Norville* v. *St. Barbe*, *T.* 47 *G.* 3. 2 N. R. *page* 434

III. *Of the Acts of the insured.*

1. Sailing orders are necessary to the performance of a warranty to depart with convoy, unless particular circumstances exempt the insured from the general rule. *Webb* v. *Thompson*, *E.* 37 *G.* 3. 1 *B.* & *P.* 5

2. Insurance on a voyage from *C.* to *D.*, on a representation that the ship was first to sail from *A.* to *B.* and from *B.* to *C.*; the voyage from *A.* to *B.* was performed, but that from *B.* to *C.* being unavoidably prevented, the ship returned to *A.*, from thence proceeded immediately to *C.*, and in performing the voyage from *C.* to *D.* was lost; and this was held a good commencement of the voyage insured. *Driscol* v. *Passmore*, *H.* 38 *G.* 3. 1 *B.* & *P.* 200

3. Insurance on a voyage from *A.* to *B.*, from *B.* to *C.* and from *C.* to *A.*; the voyage from *A.* to *B.* is performed,

performed, but that from *B.* to *C.* being unavoidably prevented, the ship returns to *A.*; from whence the captain writes to his broker in *London*, requesting him to obtain the opinion of the underwriters as to his proceeding directly to *C.* if the charterer should insist on it, and is answered by him that he thinks the policy at an end; at the instance of the charterer the captain does proceed to *C.* and on his return from thence to *A.* the ship is captured: held that the voyage insured was never abandoned. *Driscol* v. *Bovil*, *M.* 39 *G.* 3.
1 *B.* & *P. page* 313

4. A warranty to depart with convoy is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the Master they can be obtained. *Anderson* v. *Pitcher*, *E.* 40 *G.* 3.
2 *B.* & *P.* 164

5. *A.* having effected one policy on ship and another on freight, and the ship having been detained by embargo in *Russia*, he abandoned the ship to the underwriters on ship, and the freight to the underwriters on freight, at the same time receiving an authority from the underwriters on the ship to act for them, and endeavour to recover it. The ship having afterwards brought home the cargo which was on board at the time of the detention and earned freight accordingly, which *A.* received: held that in an action by the underwriters on freight against *A.* they were entitled to recover the freight so received by him. *Leatham* v. *Terry*, *T.* 43 *G.* 3. 3 *B.* & *P. page* 479

6. Action on a policy on goods, "until the cargo should be discharged and safely landed;" on the arrival of the ship, the goods insured were put on board a lighter, hired in the usual way, and brought to the Plaintiff's wharf in the evening, but not landed on account of the rough weather; the Plaintiff then undertook to see to the landing himself, but in the night, the lighter by an unavoidable accident was sunk, and the goods were lost: held that the underwriters were discharged. *Strong* v. *Natally*, *E.* 44 *G.* 3. 1 N. R. 16

IV. *Return of Premium.*

See Div. II. No. 1, 2, 3, 4.

1. In an action on a policy of insurance, with a count for money had and received, if the Defendant pay no money into Court, but establish as a defence that the risk never commenced, the Plaintiff is intitled to a verdict for the Premium, though no demand of premium was made by his counsel in opening the case. *Penson* v. *Lee*, *M.* 41 *G.* 3. 2 *B.* & *P.* 330

2. A foreigner cannot recover back the premium paid by him upon a policy of insurance if the voyage be in contravention of the *British* laws. Therefore where a policy was effected upon a *Danish* ship at and from *Bengal* (in which there are *Danish* settlements) to *Copenhagen*, and the ship loaded

at *Calcutta*, contrary to 12 *Car.* 2. c. 18. *s.* 1. the Court held the assured was not entitled to recover back the premium, even though it appeared that the practice of loading foreign ships at *Calcutta* had prevailed for a length of time, and had been authorized by act of parliament soon after the shipment in question. *Morck* v. *Abel*, *H.* 42 *G.* 3. 3 *B.* & *P.* *page* 35

INTEREST OF MONEY,

See BOND, No. 1. EXCHEQUER-CHAMBER, COURT OF, No. 1, 2. MONEY HAD AND RECEIVED, No. 6.

1. The net sum received only without interest can be recovered in an action for money had and received. *Walker* v. *Constable*, *T.* 38 *G.* 3. 1 *B.* & *P.* 306
2. If judgment for Plaintiff on an attorney's bill be affirmed in the Exchequer-Chamber, that Court will not allow interest. *Walker* v. *Bayley*, *in Error*, *T.* 40 *G.* 3. 2 *B.* & *P.* 219
3. In a contract for the sale of goods, if any particular time be limited for the payment of the price, the vendor is entitled to interest on the price from that time. *Mountford* v. *Willes*, *M.* 41 *G.* 3. 2 *B.* & *P.* 337
4. In trover for bills of exchange, the Court of Exchequer-Chamber allowed interest from the date of the final judgment upon all such bills as had been received before the judgment, and upon all such as had been received afterwards from the time of the receipt. *Atkins and Another* v. *Wheeler and Another*, *in Error*, *T.* 46 *G.* 3. 2 N. R. *page* 205
5. Upon affirmance of a judgment for the Plaintiff in an action for not performing a contract the Exchequer-Chamber refused to allow interest. *Bristow and Others*, *Executors*, &c. v. *Waddington and Others*, *in Error*, *M.* 47 *G.* 3. 2 N. R. 355

INTEREST INSURABLE,

See INSURANCE, i. 1, 2, 3. 6. 9, 10. PLEADING, v. 10, 11.

ISSUABLE PLEA,

See PRACTICE, iii. 13.

ISSUE,

See AMENDMENT, No. 9. PLEADING, viii. 2. PRACTICE, iii. 20. v. 4. 20.

ISSUES,

See PRACTICE, ii. 1. 3, 4.

J.

JOINDER OF ACTIONS,

See PLEADING, i. 3. 7.

JOINT ACTIONS,

See PLEADING, ii. 10, 11.

JOINT TENANTS,

See TITHES, No. 3.

JUDG-

JUDGMENT,

See BAIL, i. 27. ii. 6. 17. v. 1, 2. COURTS, No. 8. EJECTMENT, No. 10, 11. ENEMY, No. 2. ERROR, WRIT OF, No. 2. EVIDENCE, ii. 14. EXCHEQUER-CHAMBER, COURT OF, No. 3. EXECUTION, No. 2. EXECUTOR AND ADMINISTRATOR, No. 2. PLEADING, i. 1 iv 11. v. 24. PRACTICE, v. x. 3. PRISONER, No. 2. 4. 7. RELEASE, No. 3. TRESPASS, No. 2. WASTE.

1. The Defendant having given a warrant of attorney to confess judgment, took the benefit of an insolvent act, then became bankrupt and obtained his certificate; after which the Plaintiff entered up a general judgment, and sued out a general execution. Held regular, no dividend appearing to have been made. *Edmonson* v. *Parker*, *T.* 42 *G.* 3.

3 *B.* & *P. page* 185

2. The judgment-book is no evidence of the judgment entered therein, though the record has not been made up, and though the person interested in proving the judgment be no party to the action. *Ayrey* v. *Davenport*, *T.* 47 *G.* 3.

2 N. R. 474

3. *Semble.* That the person so interested may compel the party to enter up his judgment. *ibid. ibid.*

JURY,

See VERDICT, No. 2.

L.

LACHES,

See BAIL, ii. 14.

LANDLORD AND TENANT,

See AGREEMENT, No. 3. CORPORATION. COVENANT, No. 9. DISTRESS. EJECTMENT. EXECUTOR AND ADMINISTRATOR, No. 3, 4. LEASE, No. 2. PAYMENT, No. 1. PLEADING, ii. 12.

LAND TAX.

1. Buildings of a college in one of the universities taken into and made part of the college between the passing of the first land-tax act and the act which made that tax perpetual, are exempted from the land-tax. *All Souls' College* v. *Costar*, *H.* 44 *G.* 3.

3 *B.* & *P. page* 625

2. But where a college, soon after the passing of the first land-tax act, purchased lands of a parish under a private act of parliament which provided that the college should pay all taxes which the premises then were, or should be thereafter subject to, it was held that the lands purchased were not exempted from the land-tax.

ibid. ibid.

LARCENY,

See EMBEZZLEMENT. INDICTMENT, No. 6. POST-OFFICE.

If a servant, being solicited to become an accomplice in robbing his master's house, inform his master thereof,

thereof, who thereupon tells him to carry on the business, and consents to his opening a door leading to the premises, and being with the robbers during the robbery, and also marks his property, and lays it in a place where the robbers are expected to come, with a view to apprehend the robbers, this conduct of the master will not amount to a defence in an indictment against the robbers. *The King* v. *John Egginton and Others*, *T.* 41 *G.* 3. 2 *B. & P. page* 508

LEASE,

See AGREEMENT, No. 1. ASSIGNMENT. CORPORATION. COVENANT. EJECTMENT, No. 7. STAMPS, No. 8. TROVER, No. 2. TRUSTEE, No. 1, 2.

1. Tenant for life leases premises for 21 years, and before the expiration of that term dies; the trustees of the remainder-man, then an infant, continue to receive the rent reserved, and he, on coming of age, sells the premises by auction; in the conditions of sale the premises are declared to be subject to the lease, and in the conveyance to the purchaser the lease is referred to as in the possession of the lessee, and in the covenant against incumbrances that lease is excepted; the purchaser mortgages, and in the mortgage deeds the like notice is taken of the lease, and the mortgagees for some time receive the rent reserved: held, that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease. *Doe d. Potter* v. *Archer*, *T.* 36 *G.* 3.
1 *B. & P. page* 531

2. If a lease be granted for 7, 14, or 21 years, the lessee only has the option at which of the above periods the lease shall determine. *Dann* v. *Spurrier*, *E.* 43 *G.* 3.
3 *B. & P.* 399

LEATHER.

1. A condemnation by four out of the six triers of leather, appointed under 1 *Jac.* 1. *c.* 22. (the whole number being met for the purpose of trying) must be considered as the condemnation of all six. *Grindley and Another* v. *Barker and Others*, *E.* 38 *G.* 3.
1 *B. & P.* 229

2. If a person carrying on within a borough one of the trades mentioned in the 1 *Jac.* 1. *c.* 22. viz. that of a cutter and worker of leather, expose to sale shoes manufactured without the borough, and purchased by him ready made, the searchers may seize them under *s.* 32. if made of leather insufficiently tanned. *Hodgson* v. *Rickard and Others*, *H.* 47 *G.* 3.
2 N. R. 389

LETTERS,

See FRANKING. POST-OFFICE.

LIBEL,

See DEFAMATION. PRACTICE, vii. 4.

1. A letter written by Defendant to a third person, calling Plaintiff "a villain," is actionable, though unsup-

unsupported by proof of special damage. *Bell* v. *Stone*, *M.* 39 *G.* 3. 1 *B.* & *P. page* 331

2. An action cannot be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication may be to the character of an individual. *Curry* v. *Walter*, *E.* 36 *G.* 3. 1 *B.* & *P.* 525

3. *Qu.* Whether the matter of justification ought not to be pleaded? *ibid. ibid.*

4. If a court martial, after stating in their sentence the acquittal of an officer against whom a charge has been preferred, subjoin thereto a declaration of their opinion that the charge is malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused is highly injurious to the service, the president of the court martial is not liable to an action for a libel for having delivered such sentence and declaration to the Judge Advocate. *Jekyll* v. *Sir J. Moore*, *M.* 47 *G.* 3. 2 N. R. 341

LICENCE,

See COVENANT, No. 9. EJECTMENT, No. 7. INSURANCE, ii. 6. 20. WAGES, No. 1.

If a licence be obtained from the *British* government by *A.* to import from an enemy's country in six ships such goods as should be specified in his bills of lading, and goods be imported on board one of the six ships on account of *B.*, *C.*, and *D.*, to whom several bills of lading are sent for their respective goods, and one general bill of lading for the whole cargo be sent to *A.*, the whole cargo will be protected. *Defflis* v. *Parry*, *H.* 42 *G.* 3. 3 *B.* & *P. page* 3

LIEN,

See COSTS, iv. 2, 3.

1. *A.*, living at *N.* in *Devonshire*, ordered goods of *B.* in *London*, who sent them by ship *viâ Exeter*, consigned to *A.*, and advised him thereof; on their arrival at *Exeter* they were delivered to *C.*, a wharfinger, who received them on *A.*'s account, and paid the freight and charges; after their arrival *A.* wrote to *B.* informing him that in consequence of his affairs being deranged he should not take the goods, and telling him that they were at *Exeter;* at this time *A.* had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt; *B.* applied to *C.* for the goods, and tendered him the freight and charges due, upon which *C.* promised not to deliver them out of his custody, but afterwards did deliver them to the assignees of *A.*, though indemnified by B. Held, 1st, that *B.* had a right to stop the goods in the hands of *C.*; and, 2dly, that he might maintain trover for them against *C.* *Mills* v. *Ball*, *T.* 41 *G.* 3. 2 *B.* & *P.* 457

2. An usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, cannot affect the right of the consignor to stop the goods *in transitu*. *Oppenheim*

heim v. *Russell*, *H.* 42 *G.* 3.
3 *B.* & *P. page* 42

3. *Semb.* That such a lien could not be established even by agreement between the carrier and the consignor. *ibid. ibid.*

4. In trover by the assignees of a bankrupt against a carrier, the latter may set up a custom to retain for his general balance. *Aspinall, Assignee of Howarth*, v. *Pickford, Guildhall Sittings after Easter Term, coram Lord Kenyon.*
3 *B.* & *P.* 44 *n.*

5. *A.*, of *Newcastle*, shipped goods for *London* to order of *B.*: before their arrival *B.* wrote to say that he was in failing circumstances, and would not apply for the goods on their arrival. To this *A.* returned a general answer without making any mention of the goods, but immediately left *Newcastle* for *London*, and on his arrival applied at the wharf of *C.*, where the goods had in the mean time arrived (and where goods shipped for *B.* usually were landed and kept till sent for by him) tendering the freight and charges paid for the goods, and requiring a delivery of them, which was refused, unless upon payment of a general balance due from *B.* to *C.* for wharfage. Held that the contract as between *A.* and *B.* having been rescinded previous to the arrival of the goods, *C.* had no right to retain against *A.* for a general balance due to him from *B.* *Richardson* v. *Goss*, *E.* 42 *G.* 3.
3 *B.* & *P.* 119

6. *Semb.* that the goods were no longer in *transitu* when arrived at the wharf of *C.*, where the goods of *A.* were usually landed and kept. *Richardson* v. *Goss*, *E.* 42 *G.* 3.
3 *B.* & *P. page* 119

7. *A.*, the general agent in *London* of *B.* and Co., a house at *Paris*, with power to export for them to such markets as he should think fit, purchased goods in the name of *B.* and Co. of *C.* of *Manchester*, and directed them to be sent to *D.*, a packer in *London*. After their arrival *D.* had some of the goods unpacked and sent away, and the remainder repacked. News then arrived of the failure of *B.* and Co. Held that the goods in *D.*'s hands were no longer *in transitu*, and that *C.* therefore had no right to stop them. *Leeds* v. *Wright*, *H.* 43 *G.* 3. 3 *B.* & *P.* 320

8. On the 16th of *March* 1802, goods were forwarded from *Manchester*, addressed to *A.* at the *Bull-and-Mouth* Inn, *London*, in consequence of a previous order from him. On the 23d of the same month, the goods were sent to the Defendant's house as the packer of *A.*, the latter having given no direction at the *Bull-and-Mouth* Inn respecting these particular goods; but having given a general order that all goods addressed to him should be sent to the Defendant, *A.* having no warehouse of his own. On the 11th of *March* *A.* committed an act of bankruptcy. When the goods arrived at the Defendant's they were booked to the account of *A.*, and the Defendant not knowing of *A.*'s bankruptcy, unpacked the goods to ascertain the contents. On the 31st of *March*, the goods were claimed by the

the consignees, and on the day after by the assignees of *A.*, against whom a commission had been taken out. Held that the *transitus* of the goods was at an end when they arrived at the Defendant's house, and consequently that the Plaintiffs, as the assignees of *A.*, were entitled to recover them in an action of trover. *Scott* v. *Pettit*, *T.* 43 *G.* 3.
3 *B.* & *P. page* 469

9. *A.*, a factor, having sold goods of *B.* in his own name to *C.*, the latter, without paying for these goods, sent another parcel of goods to *A.* to sell for him, never having employed *A.* as a factor before. *C.* then became bankrupt, and his assignees claimed the goods sent by him to *A.*, and which still remained unsold, tendering the charges upon those goods *A.* refused to deliver them up, claiming a lien upon them for the price of the former goods sold by him to *C.* there being a balance then due from *B.* to himself. Held that the assignees were entitled to recover. *Houghton* v. *Matthews*, *T.* 43 *G.* 3.
3 *B.* & *P.* 185

10. A number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee; who went to the wharf, weighed the whole, took away several bales, and then became bankrupt; whereupon the vendor, within 10 days from the time of the sale, ordered the wharfinger not to deliver the remainder. By the custom of the trade the charges of warehousing were to be paid by the vendor for 14 days after the sale. Held that the vendee had taken possession of the whole, and that the vendor had no right to stop what remained in the hands of the wharfinger. *Hammond* v. *Anderson*, *T.* 44 *G.* 3.
1 N. R. *page* 69

11. A carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. *Butler* v. *Woolcott*, *M.* 46 *G.* 3.
2 N. R. 64

LIGHTER-MAN,

See INSURANCE, ii. 5. iii. 6.

LIMITATIONS OF ACTIONS,

See PLEADING, v. 16. PRACTICE, v. 3. TIME, No. 1. USURY, No. 4.

1. *J. S.* demised lands to the rector of *D.* for 40 years at a certain rent, the rector, after covenanting for payment of the rent, further granted to *J. S.* the tithe of oats of the parish of *D.*; the lease also contained a proviso for re-entry in case the rent should be in arrear, or *J. S.*, his heirs, &c. should be disturbed by the rector or his assigns in the receipt of the tithe, and concluded with a covenant on the part of *J. S.*, that the rector should quietly enjoy the lands under the covenants, grants, and agreements contained in the lease. After the expiration of the lease, the rectors continued to hold the

the land, but withheld the rent for more than 20 years; the heirs of *J. S.* at the same time continuing to take the tithe of oats, and some confusion existing as to the respective rights of the rector and the heirs of *J. S.*, the latter being portionists of the tithes of the parish. Held in ejectment by the representatives of *J. S.* against the rector, that the possession of the land by the rector was not adverse so as to let in the operation of the statute of limitations. *Roe ex dem. Pellatt* v. *Ferrars*, *M.* 42 *G.* 3.
2 *B.* & *P. page* 542

2. Under a plea of the statute of limitations the Plaintiff gave in evidence a letter of the Defendants, in answer to an application for the payment of his debt, in which the latter referred the Plaintiff to his solicitors, by whose opinion he should be governed, adding "they are in possession of my determination and ability;" and also a conversation with the Defendant's solicitors, in which they stated that if the Plaintiff had any letter which would bind the Defendant, the debt would be paid if it amounted to 100*l.*; this being left to the jury, a verdict was found for the Plaintiff, but the Court, inclining to think it did not take the case out of the statute, granted a new trial. *Bicknell* v. *Keppel*, *E.* 44 *G.* 3. 1 N. R. 20

LIVERY,

See DOWER.

LONDON,

See BARON AND FEME, No. 4, 5, 6.

LORDS' ACT.

See INSOLVENT.

LUNATIC,

See FINE, No. 7.

1. If a person against whom a commission of lunacy has issued, be arrested, the Court of Common Pleas has no power to discharge him on the ground of his lunacy. *Steel* v. *Alan*, *H.* 41 *G.* 3.
2 *B.* & *P. page* 362

2. Nor will the Court compel security for costs in error on the ground of the Plaintiff in error being a lunatic. *ibid.* 437

3. A lunatic may be brought up by *habeas corpus* from *St. Luke's* Hospital to be surrendered in discharge of his bail. *Pillop* v. *Sexton*, *M.* 44 *G.* 3. 3 *B.* & *P.* 550

M.

MALICIOUS PROSECUTION,

See ACTION ON THE CASE, No. 1, 2, 3, 4.

MANDAMUS,

See INDIA.

MANOR,

See COMMON. COPYHOLD. COVENANT, No. 9. EJECTMENT, No. 7. PARTITION, No. 2.

MANUMISSION,

See SLAVE.

MARKET,

MARKET,
See TIME, No. 2.

Qu. Whether if no specific toll be granted in letters patent, creating a market, the grantee be entitled to any toll, and whether in such case he can support an action for an injury to his market? *Holcroft* v. *Heel*, *E.* 39 *G.* 3.
1 *B.* & *P. page* 400

MASTERS AND SERVANT,
See ASSUMPSIT, No. 3. DEFAMATION, No. 2. NUISANCE.

MASTERS IN CHANCERY,
See RATE.

MEMORANDUM,
See FRAUDS, STATUTE OF, No. 8.

MEMORIAL,
See ANNUITY.

MISJOINDER,
See PLEADING, i. 4.

MISNOMER,
See BAIL-PIECE. ESTOPPEL, No. 2.

1. The Plaintiffs sue by the name of mayor and burgesses of the borough of *Stafford*, and give in evidence a charter, by which they appear to have been incorporated by the name of the mayor and burgesses of the borough of *Stafford*, in the county of *Stafford*: this is not in bar. *Mayor and Burgesses of Stafford* v. *Bolton*, *E.* 37 *G.* 3. 1 *B.* & *P.* 40
2. But might have been pleaded in abatement. *ibid. ibid.*
3. Though if the variance had been in matter of substance, instead of mere matter of addition, so that no such corporation as that mentioned in the declaration had appeared to have existed, it might have been in bar. *Mayor and Burgesses of Stafford* v. *Bolton*, *E.* 37 *G.* 3. 1 *B.* & *P. page* 44
4. Defendant being arrested by the name of *F. H.*, put in bail by the name of *S. H.*; Plaintiff then declared thus: "*S. H.* arrested by the name of *F. H.* was attached to answer," &c. Defendant, without craving oyer, pleaded in abatement of the writ that his name was *S. H.*; Plaintiff having treated this plea as a nullity, and signed judgment accordingly, the Court refused to set it aside. *Murray* v. *Hubbart*, *H.* 37 *G.* 3. 1 *B.* & *P.* 645

MONEY HAD AND RECEIVED,
See BANKRUPT, iii. 12, 13. BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 13. COMPOSITION, DEED OF. INTEREST OF MONEY, No. 1.

1. A broker who has received the amount of a loss from the insurers, to the use of the insured, on account of an insurance on *British* goods in an imperial ship trading to the *East Indies*, in contravention of 7 *G.* 1. *st.* 1. *c.* 21. *s.* 2. and who has had no intimation from the insurers to retain, shall not be allowed to set up the illegality of the contract as a defence in an action by the insured for money had and received. *Tenant* v. *Elliott*, *E.* 37 *G.* 3. 1 *B.* & *P.* 3

2. If

2. If *A.* receive money of *B.* to the use of *C.*, it may be recovered by *C.* in an action for money had and received, though the consideration on which *B.* paid it be illegal. *Farmer* v. *Russell and Another*, *T.* 38 *G.* 3. 1 *B.* & *P. page* 296

3. *Qu.* Whether the case would be varied if *A.* were a party to the contract between *B.* and *C.*? *ibid. ibid.*

4. *A.* with a view to accommodate *B.*, lent him a bill drawn by himself upon and accepted by *C.*, who had effects of his in his hands; *B.* indorsed it to *D.*, who indorsed it over; the day before the bill became due, *B.* paid the amount to *A.*, who on hearing that *C.* had failed gave *B.* a check for the amount of the bill, and sent him with it to *D.* to enable him to pay the bill when due; four days after that time *A.* learning that payment had not been demanded, desired *D.* not to pay the bill, as no notice of non-payment had been given by the holder, and offered to indemnify him; notwithstanding this *D.* afterwards paid the bill: held, that *D.* paid the money in his own wrong; and that *A.* was entitled to recover back the money paid into the hands of *D.* by *B.* in an action for money had and received. *Whitfield* v. *Savage*, *M.* 41 *G.* 3. 2 *B.* & *P.* 277

5. *A.* in consideration of 200 guineas paid by *B.*, gave a bond for the payment of an annuity to the latter of 100 guineas until the hop duty should amount to a certain sum: before this event had taken place *A.* brought an action to recover back the 200 guineas of *B.* Held, that the action was maintainable. *Tappenden* v. *Randall*, *T.* 41 *G.* 3. 2 *B.* & *P. page* 467

6. In an action for money had and received, nothing but the net sum received without interest can be recovered. *ibid. ibid.*

7. *A.* being indebted to *B.* in 700*l.* applied to *C.* to lend him that sum, who agreed so to do, provided *A.* would allow him to deduct therefrom 80*l.* due from *B.* to himself upon stock-jobbing transactions; accordingly *C.* advanced 620*l.* and *A.* gave him a promissory note for 700*l.*; *A.* then paid over to *B.* the 620*l.*, who gave him a discharge for the whole 700*l.*; the promissory note for 700*l.* given by *A.* being paid when due, *B.* brought an action against *C.* to recover 80*l.* as money had and received by *C.* to his use: held that *B.* could not maintain the action, but that it must be brought by *A.* if by any one. *Scholey* v. *Daniel*, *M.* 42 *G.* 3. 2 *B.* & *P.* 540

8. *A.* by his will devised to *B.*, *C.*, *D.*, and *E.* two parcels of land upon trust to sell and divide the money among his brother's and sister's children. *B.*, *C.*, *D.*, and *E.*, the latter being one of 24 persons entitled under the will to a share of the money, were proceeding to sell, when it was agreed by the three first trustees and the 23 other persons entitled to the money, that *E.* should become the purchaser of the two parcels of land, paying 300*l.* for one and 700*l.* for the other. A conveyance was accordingly prepared and executed by *B.* and *C.* only,

only, upon which *E.* took possession of the lands and paid the purchase money, which was divided among the several persons entitled under the will. *E.* being afterwards evicted from the smaller parcel in consequence of a defect in the title derived under the will, brought an action for money had and received against one of the 23 persons to recover the share of the 300*l.* received by him, at the same time refusing to give up the parcel of lands for which 700*l.* had been paid: held, that he was entitled to recover, *Johnson* v. *Johnson*, *E.* 42 *G.* 3. 3 *B.* & *P. page* 162

9. *A.* having sold certain leasehold premises to *B.*, assigned them by indenture, containing a proviso that *B.* should not assign over until the whole of the purchase-money should have been paid, and *B.* and *C.* covenanted for themselves and their executors, administrators and assigns, for the payment of the money. The premises having been taken in execution for a debt of *B.*, who had not paid the purchase-money, were sold by the sheriff to *D.*, who paid down a deposit, and agreed to complete the purchase on having a good title; held that the non-payment of the purchase-money by *B.* was a sufficient objection to the title, and that *D.* might recover back his deposit in an action for money had and received. *Elliot* v. *Edwards*, *T.* 42 *G.* 3. 3 *B.* & *P.* 181

10. A bill being presented by the indorsee to the drawee for acceptance, the latter on accepting it said, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands which would be paid, he would take all risks: held, that this conversation, together with the bill accepted by the drawee, did not amount to sufficient evidence to entitle the indorsee to recover against the drawee the amount of the bill accepted on a count for money had and received. *Whitwell* v. *Bennett*, *M.* 44 *G.* 3. *3 B. & P. page 559*

11. *A.* having obtained a patent for an invention, of which he supposed himself the inventor, agreed to let *B.* use it upon payment of a certain annual sum secured by bond; this sum was paid for several years, when *B.* discovering that *A.* was not the inventor, but that it was in public use before *A.* obtained his patent, brought an action for money had and received to recover back the amount of the annuity paid: held, that he could not recover. *Taylor* v. *Hare*, *E.* 45 *G.* 3. 1 N. R. 260

12. The Plaintiff having declared upon an agreement to deliver soil or breeze, with a count for money had and received, proved that the Defendant having agreed to deliver soil, he the Plaintiff paid 2*l.* 5*s.* for earnest, but that the Defendant refused to deliver the soil: held, that he could not recover damages for the non-delivery on the first count, on account of the variance; nor the 2*l.* 5*s.* upon the second, because the agreement was still in force. *Cooke* v. *Munstone*, *T.* 45 *G.* 3. 1 N. R. 351

MORTGAGE.

The trustees under a turnpike act having demised to one of several mortgagees, such proportion of the tolls arising from the road, and of the toll-houses and toll-gates, for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to repay himself the interest due: held, that he might well maintain his action, notwithstanding a clause in the act that all the mortgagees should be creditors upon the tolls in equal degree. *Doe d. Banks* v. *Booth*, *T.* 40 *G.* 3. 2 *B.* & *P. page* 219

MUTINY,

See INDICTMENT, No. 1, 2, 3.

N.

NATURALIZATION,

See SUBJECT.

NAVIGABLE RIVERS,

See INCLOSURE ACT.

NAVIGATION ACTS,

See INSURANCE, i. 14. ii. 9. iv. 2. SHIPS.

NEGLIGENCE,

See ATTORNEY, No. 6, 7.

NEWSPAPER,

See BANKRUPT, iii. 17. PRACTICE, vii. 4.

NEW TRIAL,

See COSTS, i. 17. INSURANCE, i. 16. VERDICT, No. 2.

1. Defendant brought a writ of error on the first day of term; obtained a rule *nisi* for a new trial on the second, and justified bail in error before cause shewn; this was held to be no objection to his supporting the rule for a new trial, as a point of importance was depending, which would have been shut out in the court of error. *Sir B. Hammet, Knt. and Others* v. *Sir W Yea, Bart. M.* 38 *G.* 3.
1 *B.* & *P. page* 149. *n.*
2. Where no point has been saved at the trial, the Court will not set aside a verdict on a question of law, if the justice and conscience of the case be with it. *Cox* v. *Kitchin, M.* 39 *G.* 3.
1 *B.* & *P.* 338
3. If the testimony of witnesses, on which a verdict has proceeded, be founded on, and derive its credit from particular circumstances, and those circumstances be afterwards clearly falsified by affidavit, the Court will grant a new trial. *Lister, One, &c.* v. *Mundell, E.* 39 *G.* 3. 1 *B.* & *P.* 427
4. In an action on the 32 *Geo.* 2. *c.* 28. for penalties against a sheriff's officer for taking a larger fee upon an arrest than was allowed by law, Plaintiff having been nonsuited for want of proof of the sum allowed by law, the Court, being of opinion

nion that such proof was necessary to support the special count, refused to set aside the nonsuit in order to enable the Plaintiff to recover on the money counts, since he might have obtained redress by summary application. *Martin* v. *Slade*, *M.* 46 *G.* 3.

2 N. R. *page* 59

NOLLE PROSEQUI,

See PRACTICE, v. 2. viii.

NON-RESIDENCE.

See VARIANCE, No. 10.

NONSUIT,

See ACTION, PERSONAL. BANKRUPT, iii. 5.

NONSUIT, *Judgment as in case of.*

See PRACTICE, iv. 2. v. 7. 22. 24.

1. Judgment as in case of a nonsuit may be entered up against the Demandant in a writ of right. *Almgill et Ux.* v. *Pierson and Others*, *M.* 38 *G.* 3. 1 *B.* & *P.* 103

2. And the Court will not relieve him if he has conducted himself unfairly towards the tenant in the course of the proceedings. *ib. ib.*

NOTICE,

See BAIL, i. 11. 13. 17. BILLS OF EXCHANGE, No. 4, 5, 6. EJECTMENT, No. 12. INSOLVENT, No. 18. PRACTICE, i. 7. iii. 9. 21. 23. iv. 7. 10. TITHES, No. 1.

NOTICE OF ACTION.

1. A notice of action to a magistrate under the 24 *Geo.* 2. *c.* 44. *s.* 1. indorsed with the name of the Plaintiff's attorney, and the words "of *Birmingham*," as describing the place of his abode, held sufficient. *Osborn*, v. *Gough*, *M.* 44 *G.* 3.

3 *B.* & *P. page* 551

2. In a notice of action by three Plaintiffs, they were described "*William Wood* of *Rotherhilhe* in the county of *Surry*, merchant, *Alexander Wood*, late of the same place, mariner, and *Osborn Deverson*, late of the same place, mariner." Held sufficient, though it was objected that *Rotherhithe* was too large a description of the first, and that no description was given of the actual residence of the two last. *Wood and Others* v. *Folliot*, C. B. *T.* 26 *G.* 3.

3 *B.* & *P.* 552. *n.*

3. Notice of action was subscribed "Given under my hand at *Durham*, the 11th day of, &c. *Richd. Ratcliffe*, attorney—for, &c." without adding any place of residence; held insufficient. *Taylor* v. *Fenwick*, B. R. *M.* 23 *G.* 3.

3 *B.* & *P.* 553. *n.*

NUISANCE.

A. having a house by the road side, contracted with *B.* to repair it for a stipulated sum, *B.* contracted with *C.* to do the work, and *C.* with *D.* to furnish the materials: the servant of *D.* brought a quantity of lime to the house and placed it in the road, by which the Plaintiff's carriage was overturned. Held that *A.* was answerable for the damage sustained. *Bush* v. *Steinman*, *E.* 39 *G.* 3.

1 *B.* & *P.* 404

NUL TIEL RECORD,

See PRACTICE, v. 14.

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O.

OBLIGATION,

See BOND. CONDITION, No. 3.

OFFICE,

See RESIGNATION BOND.

OFFICER,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 12. EVIDENCE, ii. 33. EXCISE. EXTORTION. NOTICE OF ACTION, No. 1. TRESPASS, No. 2, 3.

1. If an officer seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued without a previous demand of a copy and perusal of the warrant, according to the 24 *Geo.* 2. *c.* 44. *Price* v. *Messenger*, *E.* 40 *G.* 3. 2 *B.* & *P. page* 58

2. If the warrant be to seize "stolen goods," and he seize goods which turn out not to have been stolen, he is still within the protection of the 24 *Geo.* 2. *c.* 44. *ibid. ibid.*

OYER,

See MISNOMER, No. 4.

Oyer may be prayed at any time before the expiration of 24 hours after demand of a plea, though the rule to plead be out. *Sparkes* v. *Simpson*, *H.* 41 *G.* 3. 2 *B.* & *P.* 379

P.

PACKER,

See LIEN, No. 7, 8.

PAPISTS,

See FRANKING,

PARDON,

See PLEADING, v. 1.

PARLIAMENT,

See FRANKING.

PARTICULARS, BILL OF,

See PRACTICE, iii.

PARTITION.

1. The 8 & 9 *W.* 3. *c.* 31. *s.* 1. which directs the form to be pursued in a writ of partition, applies only to cases where the tenant does not appear. *Dyer* v. *Bullock and Others*, *M.* 39 *G.* 3. 1 *B.* & *P. page* 344

2. The customary tenements in the North of *England* which are parcels of the respective manors in which they are situate, and descendible from ancestor to heir by the hereditary right called tenant-right, and held of the lord according to the custom, are not within the statutes of partition. *Burrell* v. *Dodd*, *E.* 43 *G.* 3. 3 *B.* & *P.* 378

3. Pleadings on the writ *de partitione facienda.* *ibid. ibid.*

PARTNERS,

See AFFIDAVIT TO HOLD TO BAIL, No. 19. ARBITRATION, No. 7. CONSIGNMENT. ILLEGAL CONTRACT,

TRACT, No. 4, 5. PLEADING, ii. 10. iii. 11.

1. *A.*, *B.*, *C.*, and *D.* were partners in a banking house at *Liverpool*, and *C.* and *D.* also carried on a separate mercantile concern in *London*; *J. S.* having accepted bills payable at the house of *C. D.* employed *A.*, *B.*, *C.*, and *D.* to get them paid accordingly, and agreed to deposit with them good bills indorsed by him, for the purpose of enabling them so to do; *A.*, *B.*, *C.*, and *D.* debited *J. S.* in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by *J. S.* were remitted by *A.*, *B.*, *C.*, and *D.* to *C.* and *D.* upon the general account between the two houses, and before any of the acceptances of *J. S.* became due, both houses failed, and *J. S.* was obliged to pay his own acceptances. Held that the assignees of *C.* and *D.* were entitled to retain against *J. S.* the bills remitted to them by *A.*, *B.*, *C.*, and *D.* *Bolton* v. *Puller*, *T.* 36 *G.* 3.
1 *B.* & *P. page* 539

2. Held also, that it made no difference that one of the bills remitted did not arrive in *London* till after the bankruptcy of *C.* and *D.*, though sent by *A.*, *B.*, *C.* and *D.* before.
ibid. ibid.

3. If three partners (two of whom reside abroad, and one in *England*) be sued for a partnership debt, and the partner resident in *England* appear to the action, but refuse to appear for the partners resident abroad, the sheriff under a *distringas* against the two partners may take partnership effects, though paid for by the partner resident in *England* alone, to whom the partnership was largely indebted; and the Court will not relieve him against such distress. *Morley* v. *Strombom and Others*, *M.* 43 *G.* 3.
3 *B.* & *P. page* 254

4. If a *fi. fa.* issue against one of several partners, the Court will not, at the request of the partnership creditors, give the sheriff time to return the writ until an account can be taken of the several claims upon the partnership property. *Parker* v. *Pistor*, *M.* 43 *G.* 3.
3 *B.* & *P.* 288

5. A *fi. fa.* having issued against the effects of the Defendant, who was jointly concerned in a manufactory with 25 other persons, to whom he was indebted to a greater amount than his whole share, and the sheriff having seized the whole of the partnership property, the Court refused to refer it to the prothonotary to inquire what was the Defendant's interest in the effects seised. *Chapman* v. *Koops*, *M.* 43 *G.* 3. 3 *B.* & *P.* 289

PARTY WALLS.

1. If the lessee of a house at rack-rent under-let it at an advanced rent, he is liable to contribute to the expences of a party wall built under the 14 *G.* 3. *c.* 78. *Sangster* v. *Birkhead*, *T.* 38 *G.* 3.
1 *B.* & *P.* 303

2. Nor is the operation of the statute at all varied by any covenants to repair, entered into between the landlord and his tenant.
ibid. ibid.

PATENT,

See AGREEMENT, No. 6. BANKRUPT, iii. 14, 15, 16. COVENANT, No. 6. DEED. MONEY HAD AND RECEIVED, No. 11.

PAVING RATE,

See RATE, No. 1.

PAUPER,

See COSTS, ii. 1, 2, 3.

PAYMENT,

See ANNUITY. BANKRUPT, iii. 7, 8, 9. 11, 12, 13. BOND, No. 1. 3. INSOLVENT, No. 16. MONEY HAD AND RECEIVED, No. 4.

1. If *A.*, tenant for life, subject to forfeiture, remainder over to *B.*, lease to *C.* for a term, and afterwards apprehending that he has forfeited, acquiesce in *B.*'s claiming and receiving the rent from *C.*, *A.*'s executor, on shewing that he acquiesced under a false apprehension, may recover from *C.* the amount of rent erroneously paid to *B. Williams, Executor*, &c. v. *Bartholomew, M.* 39 *G.* 3.

1 *B. & P.* page 326

2. *Assumpsit* for goods sold and delivered, Plaintiff proved that having sold goods to the Defendant, he received from him a check upon *J. S.*, a banker, directing the latter, two months after date, to pay to the Plaintiff a bill at two months for the amount of the goods, which check was indorsed by the Plaintiff, and paid by him into the banking-house of *J. S.*, who entered it short in the Plaintiff's account; that the Plaintiff and Defendant both kept accounts with *J. S.*, and that the general course of business between *J. S.* and most of his customers was to settle accounts on certain quarterly days; when he advanced bills for his customers, or received bills from them, he entered the whole amount in his books as bills, but on the quarterly days he debited his customers with the whole amount of bills advanced to or for them, crediting them at the same time for interest from such day to the day when the bills would become due; and credited his customers for the whole amount of bills paid in by them, debiting them for the interest in like manner; and when a check was paid in for a bill to be drawn at a future day, he calculated and allowed interest on the next quarterly day to the time when such bill, if drawn, would become payable; that the account between the Plaintiff and *J. S.* had been settled only six times between *May* 1788 and *March* 1793, but that each of those settlements took place on a quarterly day; that on the 18th of *March* 1793, *J. S.* became bankrupt, a quarterly day having intervened between the payment of the check into the house of *J. S.* and his bankruptcy, upon which last quarterly day no settlement of accounts between the Plaintiffs and *J. S.* took place, nor was the amount of the check ever carried out as cash, or any calculation of interest made thereon, till after the bankruptcy; that when the check was paid into the banking-house of *J. S.* there was a balance

lance of 51*l.* 11*s.* in favour of Plaintiff, which was much overdrawn before the bankruptcy of *J. S.*, without any other addition to the credit side of the Plaintiff's account than the check in question. Held that the check in question did not, under all the circumstances of the case, amount to a payment for the goods by the Defendant. *Brown* v. *Kewley*, *in Error*, *M.* 42 *G.* 3. 2 *B. & P. page* 518

3. The Defendant offered to prove that on the last-mentioned quarterly day the account between himself and *J. S.* was settled, at which time he was debited for the whole amount of the check, and credited for interest thereon from the day of settlement to the day when the bill mentioned in the check, if drawn, would have become due. Held that this evidence was not admissible. *ibid. ibid.*

PAYMENT OF MONEY INTO COURT,

See Costs. i. 6, 7. 15. Evidence, ii. 3. Practice, viii. 2. Tender, No. 1.

1. In *assumpsit* against a carrier for goods spoiled, the Defendant was not allowed to pay the invoice price into court. *Fail* v. *Pickford*, *T.* 40 *G.* 3. 2 *B. & P.* 234

2. If a Plaintiff by his bill of particulars confine his demand to one count of his declaration, and Defendant pay money into court generally, the Plaintiff is not at liberty to apply the money so paid in to any of those counts on which he is precluded from giving evidence by his bill of particulars. *Holland* v. *Hopkins*, *T.* 40 *G.* 3. 2 *B. & P. page* 243

3. The Court will not order money paid into court by a Defendant through a mistake to be restored to him. *Vaughan* v. *Barnes*, *E.* 41 *G.* 3. 2 *B. & P.* 392

4. Though perhaps in case of fraud they would. *ibid. ibid.*

5. Where money is paid into court generally upon a declaration in contract, it is an admission of the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties. *Bennett* v. *Francis*, *M.* 42 *G.* 3. 2 *B & P.* 550

6. Therefore where a Defendant who had possessed himself of goods belonging to the Plaintiff, and had sold part and kept the residue in specie, paid money into court generally upon a declaration containing a count for goods sold and delivered, it was held that he had thereby admitted the transaction to have been converted into a contract, and that the plaintiff was entitled to recover the value of all the goods, under the count for goods sold and delivered. *ibid. ibid.*

7. In an action for breach of a contract to deliver goods at a certain price *per* ton, the Court will not allow the Defendant to pay money into court. *Strong* v. *Simpson*, *H.* 42 *G.* 3. 3 *B. & P.* 14

8. If the Defendant pay money into court generally upon a declaration containing a count on a policy of insurance, together with the mo-

ney counts, and it appear that the Plaintiff, by his conduct previous to the trial, induced the Defendant to believe that the only point to be tried was a question of fraud, and suffered him to prepare his evidence accordingly, the Court will not allow the Plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by payment of money into court. *Muller* v. *Hartshorne*, *M.* 44 *G.* 3.
3 *B. & P. page* 556

2. In *C. B.* if the Plaintiff proceed to trial after money paid into court, he is notwithstanding entitled to costs up to the time of the money benig paid in. *ibid.* *ibid.*

PEER,

See FRANKING. PLEADING, ii. 7, 8.

PENAL ACTION,

See TIME, No. 3.

1. The Court will not give leave to compound on a penal action after verdict, unless the Defendant can shew circumstances which entitle him to such an indulgence. *Crowder* v. *Wagstaff*, *E.* 37 *G.* 3.
1 *B. & P.* 18

2. In compounding a penal action on the post-horse act, which gives costs to the prosecutor, the Court will allow the prosecutor to receive the deficient duties (not amounting to 40*s.*) and full costs of suit, though together exceeding the 40*s.* paid to the crown. *North* q. t. v. S[illegible]t, *T.* 37 *G.* 3.
1 *B. & P.* 51

PENALTY,

See ATTORNEY, No. 6. BY-LAW. PLEADING, ii. 1. iii. 1.

1. By articles of agreement between the Plaintiff and Defendant it was agreed on the part of the former that he should pay the latter so much *per* week to perform at his theatres, with her travelling expences of removing from one theatre to another, except extra baggage, and on the part of the Defendant that she should perform at the theatre such things as should be required by the Plaintiff, and attend at the theatre beyond the usual hours on any emergency and at rehearsals, or be subject to such fines as are established at the theatres, and be at the theatre half an hour before the performances begin, and abide by the regulations of the theatres, and pay all fines; and it was agreed by both parties that "either of them neglecting to perform that agreement should pay to the other 200*l.*" *Assumpsit* upon this agreement, stating several breaches, and concluding to the Plaintiff's damage of 200*l.* Held that the sum mentioned in the agreement was in nature of a penalty, and not of liquidated damages. *Astley* v. *Weldon*, *H.* 41 *G.* 3. 2 *B. & P. page* 346

2. If a party agree not to do some specified act under a "penalty" of 100*l.* such sum cannot be considered in the nature of liquidated damages. *Smith* v. *Dickenson*, *H.* 44 *G.* 3. 3 *B. & P.* 630

PERJURY.

Qu. Whether any one giving his testimony under a commission issuing out of a court of law for the examination of witnesses in *Scotland*, could be convicted of perjury. *Calliand* v. *Vaughan*, *H.* 38 *G.* 3. 1 *B. & P. page* 210

PERSONAL ACTION,

See ACTION PERSONAL.

PHYSICIAN,

See EVIDENCE, ii. 32.

PLEADING,

See ABATEMENT, No. 2, 3. ADDITIONS. AGREEMENT, No. 6, 7. AID PRAYER, No. 1. BANKRUPT, ii. 4, 5, 6. iii. 12, 13. BARON AND FEME, No. 11, 12. BOND, No. 2, 3. BYE-LAWS. COPYHOLD. COSTS, i, 9, 10. COVENANT, No. 2. DAMAGES. DETINUE. DISCONTINUANCE, No. 1, 2. EJECTMENT, No. 10, 11. ESTOPPEL. EVIDENCE, ii. 3, 4. 7, 8, 9, 10, 11. EXECUTOR AND ADMINISTRATOR, No. 2. INDICTMENT. INSURANCE, i. 2. 7. 9. JUDGMENT. LIBEL, No. 3. MISNOMER. MONEY HAD AND RECEIVED, No. 10. PARTITION. No. 3. PRACTICE, iii. v. 3. 14. 21. vii. 6. QUARE IMPEDIT. TENDER, No. 1. VARIANCE. USURY, No. 7.

I. *Of the Form of Action and Joinder of Actions.*

II. *Of the Parties thereto.*

III. *When particular Matters may be pleaded.*

IV. *Of Certainty in Pleading.*

V. *Of the Manner of Pleading in general.*

VI. *Of Title.*

VII. *Of Surplusage.*

VIII. *What cured by Verdict.*

I. *Of the Form of Action; and Joinder of Actions,*

See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 10. 14. EXECUTOR AND ADMINISTRATOR, No. 8. GOODS SOLD AND DELIVERED, No. 1, 2. SALVAGE.

1. *A.* agreed with *B.* to let him land rent free, on condition that *A.* should have a moiety of the crops; while the crop was on the ground it was appraised for both parties: *A.* declared in *indebitatus assumpsit* for a moiety of the value of the crops sold to *B.*, without stating the special agreement, and held, that he might well do so, as the special agreement was executed by the appraisement, and the action arose out of something collateral to it. *Poulter* v. *Killingbeck*, *E.* 39 *G.* 3. 1 *B. & P. page* 397

2. *A.* declared in case against *B.* for sinking his boat, and after averring a non-feasance in *B.* as the cause stated him to have acted *with great force and violence* in accomplishing the injury; *A.* recovered, and on error brought because the action should have been trespass, not case, and because the two actions were mixed, the Court referred the concluding expressions to the non-feasance first stated, and held that the declaration

declaration would support the judgment. *Turner* v. *Hawkins*, *in Error*, *E.* 36 *G.* 3.
1 *B.* & *P. page* 472

3. An executor cannot join a count upon a bond given to his testator, and a count upon a bond given to himself as executor in the same action. *Hosier* v. *Lord Arundell*, *H.* 42 *G.* 3. 3 *B.* & *P.* 7

4. The first count of a declaration being in trover for bills of exchange, and the second and third counts stating the delivery of the bills to the Defendant in order that he might get them discounted for a certain commission, and his having got them discounted, and his converting and disposing of the money to his own use; the Defendant demurred generally, on the ground of a misjoinder of tort and contract, the subject of the two last counts being matter of contract: but the Court held that on a general demurrer, as all the counts were in the form of tort, judgment must be for the Plaintiff if any one count was good. *Judin* v. *Samuel*, *E.* 44 *G.* 3. 1 N. R. 43

5. Declaration against the Defendant for driving his cart against the Plaintiff's horse with force and violence, alleging it to have been done "by and through the mere negligence, inattention, and want of proper care" of the Defendant. On demurrer to this declaration as not being in trespass, held that this declaration in case was good. *Rogers* v. *Imbleton*, *H.* 46 *G.* 3.
2 N. R. 117

6. If one ship run against another by the negligence of the pilot while the owner is on board, the remedy against the owner is an action on the case. *Huggett* v. *Montgomery*, *T.* 47 *G.* 3. 2 N. R. *page* 446

7. An action for debauching the Plaintiff's daughter *per quod servitium amisit*, is an action of trespass, and a count thereon may be joined with a count for breaking and entering the house. *Woodward* v. *Walton*, *T.* 47 *G.* 3.
2 N. R. 476

II. *Parties thereto*,

See BANKRUPT, iii. 10. BARON AND FEME, No. 4, 5, 6. CONSIGNOR AND CONSIGNEE, No. 1. REPLEVIN, No. 1, 2. SHIP, No. 4.

1. In actions on contracts, if all the parties having a right to sue are not made Co-plaintiffs, it is in bar. *Scott* v. *Godwin*, *T.* 37 *G.* 3.
1 *B.* & *P.* 73

2. *Semb. contrà* in actions on torts.
ibid. 75

3. But where all the proper parties are not made Co-defendants, it is only in abatement. *ibid.* 73

4. The master, wardens, and commonalty of a company cannot sue for a penalty forfeited to the master and wardens to the use of the master, wardens and company. *Feltmaker's Company* v. *Davis*, *M.* 38 *G.* 3. 1 *B.* & *P.* 98

5. *A.* declared against *B.* and his wife, and administratrix, with the will annexed of *C.* deceased, "for that whereas *C.* died intestate, possessed of *South-Sea* stock which she held in trust for *A.*, and upon which certain dividends were due, in consideration that *A.* at the request

request of *B.* and his wife had procured administration to be granted to the wife of *B.* as residuary legatee of *C.*, with the will annexed, for the purpose of obtaining payment of the said dividends, and had agreed to bear the expences of obtaining such administration, and to furnish evidence to entitle them to the payment of the said dividends; *B.* and his wife as such administratrix, promised to pay over to *A.* the amount of the dividends when received:" held, that as the dividends never made part of the intestate's estate, the action against *B.* and his wife as administratrix could not be maintained. *Parker* v. *Baylis et Ux.*, *H.* 40 *G.* 3. 2 *B.* & *P. page* 73

6. The three first counts of a declaration in assumpsit against executors stated promises made by the testator, the fourth was for money had and received by the Defendants "as such executors as aforesaid," stating a promise to pay by them "executors as aforesaid;" and the last was upon an account stated by the Defendants "executors as aforesaid," and stating the promise to pay in the same manner: held bad upon general demurrer. *Brigden* v. *Parkes*, *E.* 41 *G.* 3. 2 *B.* & *P.* 424

7. If a peer be sued by bill, no objection can be taken to such proceedings except by plea in abatement. *Hosier* v. *Lord Arundell*, *H.* 42 *G.* 3. 3 *B.* & *P.* 7

8. *Quære*, Whether even in that case such an objection could prevail? *ibid. ibid.*

9. *A.* agreed in writing to pay the rent of certain tolls which he had hired, "to the treasurer of the commissioners:" held, that no action for the rent could be maintained in the name of the treasurer. *Pigott* v. *Thompson*, *E.* 42 *G.* 3. 3 *B.* & *P. page* 147

10. If defamatory words be spoken of two partners respecting their trade, they may maintain a joint action for the slander, averring special damage. *Cook* v. *Batchellor*, *E.* 42 *G.* 3. 3 *B.* & *P.* 150

11. *A.*, *B.*, and *C.* being appointed assignees under a commission of bankrupt, and having acted as such, *A.* and *B.* pay each half of his bill to the solicitor: held, that *A.* and *B.* could not maintain a joint action against *C.* for his proportion of the money paid, but must each bring a separate action. *Brand and Herbert* v. *Boulcott*, *M.* 43 *G.* 3. 3 *B.* & *P.* 235

12. In debt for double the yearly value under 4 *G.* 2. *c.* 28. the Plaintiff, after stating a demise to the Defendant's wife, and her subsequent intermarriage with the Defendant, alleged in the first count a notice to quit, and a demand of possession delivered to the Defendant and his wife; and in the second count, alleged a notice to quit and demand of possession delivered to the wife previous to her marriage with the Defendant: held, that to support the second count, the wife need not be joined for conformity; and that to sustain the action it was not necessary to have given a notice to the husband subsequent to the marriage. *Lake* v. *Smith*, *H.* 45 *G.* 3. 1 N. R. 174

13. Two

13. Two proctors cannot be sued together as for one offence, in not having obtained and entered their certificates. *Barnard* v. *Gostling*, *E.* 45 *G.* 3. 1 N. R. 245

14. A declaration in replevin by *J. S.* and his wife, without shewing any cause for joining the wife, is bad on demurrer. *Serres and Wife* v. *Dodd*, *E.* 47 *G.* 3. 2 N. R. 405

15. *A.* as captain by charter-party between himself and *B.* agreed to receive a cargo of the agents and assigns of *B.*, and *B.* agreed to procure the same; *A.* having received a cargo on board, signed a bill of lading stating the goods to have been shipped by order of *C.*, and to be delivered to his order, and freight to be paid according to the charter-party. In an action for negligence in stowing the goods brought by *C.* against *A.*, held, that *C.* was only an agent, and that the action should have been brought in the name of *B.* *Moores* v. *Hopper*, *E.* 47 *G.* 3. 2 N. R. 411

16. In an action on the case upon a delivery of goods to several joint owners of a ship to be carried to *A.* for freight, alleging a deviation; if the Plaintiff fail in proving all the Defendants to be owners, he cannot recover even against those whom he proves to be owners. *Max* v. *Roberts and Others*, *T.* 47 *G.* 3. 2 N. R. 454

III. *When particular Matters may be pleaded,*

See TRESPASS, No. 1.

1. In debt for rent against a mesne assignee, the original lessor cannot reply *per fraudem* to a plea of assignment, where the Defendant derives no benefit from the premises. *Taylor* v. *Shum and Others*, *E.* 37 *G.* 3. 1 *B. & P. page* 21

2. *Quære*, Whether the replication *per fraudem* can ever be good to such a plea? *ibid. ibid.*

3. The plea *de injuriâ suâ propriâ absq. tali causâ* to a cognizance for rent in arrear is bad, upon special demurrer. *Jones* v. *Kitchin*, *T.* 37 *G.* 3. 1 *B. & P.* 76

4. It is only to be received where the defence set up is matter of excuse. *ib.* 80

5. Not where any right or interest is asserted. *ibid. ibid.*

6. Nor where the defence turns upon the plea of commandment; but the commandment must be answered. *ibid. ibid.*

7. If the lord set up a custom to have the best live or dead chattel as a heriot, *qu.* if the tenant can modify that custom by pleading another, that the homage shall assess a compensation in lieu of the heriot? *Parkin* v. *Radcliffe*, *T.* 38 *G.* 3. 1 *B. & P.* 282

8. *Sembl.* That bankruptcy of the principal cannot be pleaded by bail in their own discharge. *Beddome and Another* v. *Holbrooke and Another*, *T.* 39 *G.* 3. 1 *B. & P.* 450 *n.* (*b*) (*Donnelly* v. *Dunn*, *ib.* 448)

9. *Non damnificatus* cannot be pleaded to debt on bond conditioned for the payment of a sum of money at a certain day, though it appear by the condition to have been given by way of indemnity. *Holmes* v. *Rhodes*, *H.* 37 *G.* 3. 1 *B. & P.* 638

10. Bail

10. Bail cannot plead the bankruptcy and certificate of the principal in their own discharge. *Donnelly* v. *Dunn*, *M.* 40 *G.* 3.
2 *B.* & *P. page* 45

11. *Assumpsit* by *A.*, *B.*, and *C.*, against *D.* as one of the indorsers of a promissory note drawn by *E.* in favour of *C.*, *D.*, and (himself) *E.*, then in partnership, and by them indorsed to *A.*, *B.*, and *C.* Plea in bar, that *C.*, one of the Plaintiffs, is liable as an indorser together with *D.*, and held good on special demurrer. *Mainwaring* v. *Newman*, *H.* 40 *G.* 3.
2 *B.* & *P.* 120

12. *Assumpsit* by several as executors; plea in bar that the promises were made by the Defendant together with one of the Plaintiffs; and held good on demurrer. *Moffatt and Others* v. *Van Millingen*, *E.* 27 *G.* 3. *B. R.*
2 *B.* & *P.* 124. *in notis.*

IV. *Of Certainty in pleading.*
(*See post.* VIII.)

1. The first count in a declaration in debt for a penalty under a by-law, set forth the charter empowering the company to make by-laws, the by-law made and the breach of it; the second count omitting the above particulars, stated the penalty as being forfeited "under and by virtue of a certain by-law of the company before that time duly made, &c." and this count on special demurrer was held bad. *Feltmakers' Company* v. *Davis*, *M.* 38 *G.* 3. 1 *B.* & *P.* 98

2. If bail plead the bankruptcy of their principal in their own discharge, they must plead it circumstantially, or it will be bad on special demurrer. *Donnelly* v. *Dunn*, *T.* 39 *G.* 3.
1 *B.* & *P. page* 448

3. Or on general demurrer. *Beddome and Another* v. *Holbrooke and Another*, *T.* 39 *G.* 3.
1 *B.* & *P.* 450. *n.* (*b*)

4. Debt on bond, conditioned for *J. S.* rendering account to the Plaintiffs of all monies he should receive as their agent. Defendant pleads performance in the words of the condition; Plaintiffs reply that *J. S.* received divers sums of money amounting to 2000*l.* belonging and relating to the Plaintiff's business as their agent, and hath not rendered to the Plaintiffs an account of the said 2000*l.* or any part thereof: this replication being specially demurred to, for generality was held sufficient. *Shum* v. *Farrington*, *H.* 37 *G.* 3.
1 *B.* & *P.* 640

5. It is not sufficient to state "a certain voyage" as the consideration of wages, without specifying what that voyage is. *White* v. *Wilson*, *H.* 40 *G.* 3. 2 *B.* & *P.* 120

(*See Div.* v. No. 7.)

6. The Plaintiff in replevin pleaded in bar to an avowry for damage feazance that the *locus in quo*, from time whereof, &c. ought to be open and common, "on or before the 15th of *October*, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards," that the Plaintiff at the time when, &c. put in his cattle, "the same time being

being when the said field was and ought to be opened and common as aforesaid." Held that the plea was bad for uncertainty, even after verdict, the right of common being too generally described both in its commencement and conclusion. *Da Costa* v. *Clarke*, *T.* 40 *G.* 3.
2 *B.* & *P. page* 257

7. Declaration that "in consideration that the Plaintiff had taken the Defendant's goods on board his ship to be carried to *A.*, the Defendant promised to pay the money due for freight and carriage of the same on the delivery of the bill of lading; that the bill of lading was delivered, by reason whereof the Defendant became liable to pay a large sum, to wit, 20*l.* for freight and carriage of the said goods." Held bad on demurrer, because it did not appear that any thing became due for freight on the delivery of the bill of lading. *Blakey* v. *Dixon*, *M.* 41 *G.* 3. 2 *B.* & *P.* 321

8. *Quære*, Whether in alleging the promise to pay in the above case, the Plaintiff should not have stated the specific sum, or have said, so much as should be reasonably due? *ib. ib.*

9. In an avowry, Defendant averred that all those whose estate he now has, &c. from time whereof, &c. have been accustomed to have, and of right during all the time aforesaid ought to have had, and still of right ought to have common of pasture in the *locus in quo:* held bad, and that it did not amount to an averment of right of common at all times of the year. *Hawkins* v. *Eckles*, *H.* 41 *G.* 3.
2 *B.* & *P.* 359

10. The first count of a declaration stated that the Defendant heretofore, to wit, on such a day drew a bill of exchange bearing date the day and year aforesaid, payable two months after date. The second count stated that afterwards, to wit, on the day and year aforesaid, the Defendant drew a certain other bill of exchange, payable two months after date; without mentioning any express date in either count: held, that both counts were good. *Hague* v. *French*, *T.* 42 *G.* 3.
3 *B.* & *P. page* 173

11. Policy on indigo and bale goods; the declaration alleged that "divers goods, &c. of 3000*l.* value were put on board," and afterwards averred that "the said writing or policy of assurance was made on the said goods," &c. Held good on special demurrer. *De Symons* v. *Johnston*, *M.* 46 *G.* 3. 2 N. R. 77.

V. *Of the Manner of Pleading in general.*

See VARIANCE, No. 1.

1. A pardon, if pleaded, must be averred to be under the great seal. *Bull* v. *Tilt*, *H.* 38 *G.* 3.
1 *B.* & *P.* 199

2. The omission of "and thereupon the said *J. S.* complains" in the beginning of a declaration in trespass on the case, is no cause of special demurrer. *Dobson* v. *Sir W. Herne, Knt. and Another*, *H.* 39 *G.* 3. 1 *B.* & *P.* 366

3. To debt for an escape, Defendant pleaded a negligent escape and voluntary return, since which the prisoner had been safely kept: Plaintiff in his replication admitted the negligent escape and voluntary return,

return, but alleged that the prisoner had not been safely kept since that time, having again escaped, which was a different escape from that mentioned in the plea, and the same for which the action was brought; Defendant in his rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication as to a new assignment, a negligent escape, voluntary return and safe keeping since, in the same manner as in the plea; this latter part of the rejoinder was held bad on special demurrer. *Griffiths* v. *Eyles*, *E.* 39 *G.* 3.
1 *B.* & *P. page* 413

4. A plea that if the prisoner escaped several times (without specifying them) he returned as often, is bad. *ibid. ibid.*

5. In an action on a promissory note by the indorsee against the maker, notice of the indorsement need not be averred. *Reynolds* v. *Davies*, *M.* 37 *G.* 3. 1 *B.* & *P.* 625

6. *A.* declared against *B.* and his wife *administratrix* with the will annexed of *C.* deceased "for that whereas *C.* died intestate, possessed of *South Sea* stock, which she held in trust for *A.* and upon which certain dividends were due, in consideration that *A.* at the request of *B.* and his wife had procured administration to be granted to the wife of *B.* as residuary legatee of *C.* with the will annexed for the purpose of obtaining payment of the said dividends, and had agreed to bear the expences of obtaining such administration, and to furnish evidence to entitle them to the payment of the said dividends; *B.* and his wife as such *administratrix* promised to pay over to *A.* the amount of the dividends when received:" held that the consideration stated was insufficient to support the promise. *Parker* v. *Baylis et Ux. H.* 40 *G.* 3. 2 *B.* & *P. page* 73

7. Declaration by a sailor for wages earned "during a certain voyage, to wit, a certain voyage from the port of *London* to the coast of *Africa*, and from thence to the *West Indies*." At the trial it appeared from the articles, that the voyage was "from the port of *London* upon an intended voyage to the coast of *Africa* for slaves, and from thence to the *West Indies* or *America*, and afterwards to *London* in *Great Britain*, or to her delivering port in *Europe*:" held that the variance between the description of the voyage in the declaration and that in the articles was fatal, though the captain put an end to the voyage in the *West Indies*, and discharged the crew there. *White* v. *Wilson*, *H.* 40 *G.* 3. 2 *B.* & *P.* 116

8. And though the description of the voyage in the declaration was under a *scilicet*. *ibid. ibid.*

9. Declaration on a policy on ship and goods at and from *London* to *Emden*, "beginning the said adventure on the said goods from the loading thereof on board the said ship;" in the policy there was a memorandum whereby the said insurance was declared to be on 15 hogsheads of tobacco, marked B. S. No. 51. and 65.; special demurrer

murrer, first because the goods were not averred to have been put on board at *London;* secondly, because the goods were not alleged to have been marked or numbered as in the memorandum but only thus "15 hogsheads the goods, &c. in the said policy mentioned;" thirdly, because the plaintiff was stated to have been interested until and at the time of the loss, without shewing that he was interested at the time of the policy being made; fourthly, because no venue was laid to the allegation of loss on the high seas: *Semb.* that the declaration was bad. *De Symonds* v. *Shedden*, *E.* 40 *G.* 3.
2 *B.* & *P. page* 153

10. If *A.* and *B.* declare upon a policy of insurance, and aver that they were interested until and at the time of the loss, and it be proved that *C.*, after the policy effected but before the loss, became a partner with *A.* and *B.* in the goods insured; it seems that the variance is not fatal, for the averment of interest relates to the time of making the policy. *Perchard* v. *Whitmore*, *Guildhall sittings after Mich.* 1786, *coram Buller*, *J.*
2 *B.* & *P.* 155 *n.*

11. In a declaration for slander the Plaintiff stated that he was a jobber or dealer in the funds, and as such jobber or dealer had been accustomed lawfully to contract and had from time to time lawfully contracted, &c.: that the Defendant said of him as such jobber or dealer, "he is a lame duck," meaning that he had not fulfilled his contracts in respect of the said stocks of funds, in consequence of which divers persons refused to fulfil their contracts with him (specifying the contracts,) and he was prevented from fulfilling his contracts with other persons: held that it did not sufficiently appear either that the words were spoken of lawful contracts, or that the Plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad. *Morris* v. *Langdale*, *M.* 41 *G.* 3.
2 *B.* & *P. page* 284

12. *Qu.* Whether under such circumstances it can be stated as special damage, that divers persons refused to fulfil their contracts with the plaintiff, since he might recover a compensation by action if the contracts were lawful? *ibid. ibid.*

13. If a Defendant in replevin plead by way of justification of the taking, that he was possessed of a messuage with common appurtenant, and that the Plaintiff's cattle were damage feasant, on the common, and conclude in bar without praying a return, it seems that such a plea is bad. *Hawkins* v. *Eckles*, *H.* 41 *G.* 3. 2 *B.* & *P.* 359

14. Where three parish-churches have been united by 22 *Car.* 2. *c.* 11. the benefice may be described in pleading as one rectory. *Wilson*, *q. t.* v. *Van Mildert*, *E.* 41 *G.* 3.
2 *B.* & *P.* 394

15. Trespass for assault and false imprisonment may be laid, *diversis diebus et vicibus*. *Burgess* v. *Freelove*, *E.* 41 *G.* 3. 2 *B.* & *P.* 425

16. *Assumpsit* on a note payable by instalments, plea in bar as to the said several causes of action, except

cept the last instalment, "that the said several causes of action did not, nor did any of them accrue within six years:" held on special demurrer, that though some of the instalments might be barred, and the others not, yet that the introduction to the plea and the body of it were inconsistent. *Gray* v. *Pindar*, E. 41 *G.* 3.
2 *B.* & *P. page* 427

17. Plaintiff declared against the Defendant as acceptor of a bill of exchange, payable to certain persons using the firm of *Messrs. M'Brair, Watson* and *Co.*; Defendant pleaded that the said *Messrs. M'Brair, Watson* and *Co.* had accepted satisfaction; Plaintiff replied that the said persons so as aforesaid using the firm of *Messrs. M'Brair* and *Co.* (leaving out the name of *Watson*) did not accept satisfaction, and concluded to the country. *Semb.* that this variance could only be taken advantage of on special demurrer. *Bell* v. *Da Costa*, *E.* 41 *G.* 3. 2 *B.* & *P.* 446

18. If *A.* agree to buy of *B.*, and *B.* to sell to *A.*, goods at a certain price, to be delivered between such a day and such a day, and *B.* fail to deliver the goods within the time; it is sufficient for *A.* in declaring on the contract to aver, that he was during all the time and still is ready and willing to receive and pay for the goods, without making any allegation of an actual tender and refusal. *Waterhouse* v. *Skinner*, *E.* 41 *G.* 3.
2 *B.* & *P.* 447

19. Replevin of cattle taken in *A.* the Defendant avowed the taking in *A.* under a demise of certain premises of which *B.* was parcel, and because the cattle were damage feasant in *B.* he took them and drove them through *A.* in his way to the pound; and upon general demurrer the avowry was held to be well pleaded. *Abercrombie* v. *Parkhurst*, *T.* 41 *G.* 3.
2 *B.* & *P. page* 480

20. In an action against the sheriff for an escape on mesne process, it is sufficient to aver that the sheriff had not the body at the return of the writ, without negativing the appearance of the party or his putting in bail. *Stovin* v. *Perring*, *M.* 42 *G.* 3. 2 *B.* & *P.* 561

21. If the writ issue from *C. B.* and the declaration for an escape aver that the Defendant had not the body "before our said Lord the King" on the return day, it is bad on special demurrer. *ibid. ibid.*

22. If a declaration on a policy of insurance aver the goods to have been seized in a forcible and hostile manner by certain persons enemies of our Lord the King to the Plaintiff unknown, and it appear in evidence that they were seized by the *Spanish* government, as about to be imported into the *Spanish Main* contrary to the laws of *Spain*, such loss is not well described by the averment in the declaration. *Matthie* v. *Potts*, *H.* 42 *G.* 3. 3 *B.* & *P.* 23

23. A replication to a plea of tender, stating an original writ sued out and returned before the tender, but not proceeded upon, and then a second

second original writ sued out after the tender, and proceeded upon, but unconnected with the first writ, is no answer to the plea *Stratton* v. *Savignac*, *H.* 43 *G.* 3.
3 *B.* & *P. page* 330

24. Judgment by default having been suffered in an action on a bond, the Plaintiff entered up judgment for the penalty, together with 9*l.* 10*s.*; he then assigned breaches upon which a writ of inquiry having been executed, damages were assessed at 1115*l.* 13*s.* 4*d.* and costs 40 shillings, and the Plaintiff entered up another judgment for those damages, together with 31*l.* 6*s.* 8*d.* for costs, but afterwards entered a *remittitur* on the roll for the costs: held that the second judgment was erroneous. *Hankin* v. *Broomhead*, *H.* 44 *G.* 3.
3 *B.* & *P.* 607

25. In an action for words alleged to have been spoken of one as a candidate to serve in parliament, it is not necessary to set out the writ, in order to shew that the Plaintiff was a candidate. *Harwood* v. *Sir J. Astley*, *T.* 44 *G.* 3.
1 N. R. 47

26. The 11 *G.* 2. *c.* 19. respecting avowries in replevin, does not extend to an avowry for a rent charge. *Bulpit* v. *Clarke*, *T.* 44 *G.* 3.
1 N. R. 56.

27. The Defendant in replevin having made cognizance for rent-service as bailiff of *A.*, *B.*, and *C.* who were lawfully possessed of a certain manor, of which the *locus in quo* was parcel, and holden at a certain rent; the Plaintiff replied that *A.*, *B.*, and *C.* were not seized in their demesne as of fee of the manor: held bad on demurrer. *Bulpit* v. *Clarke*, *T.* 44 *G.* 3.
1 N. R. *page* 56

28. If a contract for freight and demurrage be entered into by deed, the Plaintiff cannot declare in debt generally, and give the deed in evidence, but ought to declare upon the deed. *Atty* v. *Parish*, *M.* 45 *G.* 3. 1 N. R. 104

29. Declaration stated that Plaintiff at the request of *E. B.* and *M. B.*, sold and delivered to them goods of a certain value; and that in consideration thereof, and also in consideration that the Plaintiff, at the request of the Defendant, would forbear and give day of payment of the said sum of money, Defendant by a certain note or memorandum in writing signed by him, undertook to pay him the money, and then alleged that Plaintiff, relying on the promise of Defendant, did forbear and give day of payment of the said sum, &c. After verdict for the Plaintiff the Court refused to arrest the judgment on the ground of the declaration not stating to whom the forbearance was given. *Marshall* v. *Birkenshaw*, *H.* 45 *G.* 3.
1 N. R. 172

30. *Semble.* That the declaration would have been good on demurrer. *ibid. ibid.*

31. *Quære.* Whether it be not bad to sue under the statute for not having obtained and entered a certificate, without distinguishing which of those two omissions the person sued has

been guilty of? *Barnard* v. *Gostling*, *E.* 45 *G.* 3.

1 N. R *page* 245

32. In an action against 46 Defendants where the declaration contained two counts for work done by Plaintiff as an attorney, and two more for work done by him, without saying in what capacity, the Court ordered two counts to be struck out, and the word "Defendants" to be substituted for the name of the Defendants in all the places where they occurred except the first. *Meeke* v. *Oxlade and Others*, *T.* 45 *G.* 3. 1 N. R. 289

33. The first count of a declaration in *assumpsit* stating an agreement between two persons, omitted the mutual promises. On motion in arrest of judgment, held that the agreement imported a promise. *Mountford and another* v. *Horton*, *M.* 46 *G.* 3. 2 N. R. 62

34. Defendant agreed to pay to Plaintiff within two months 1500*l.* and in consideration thereof Plaintiff agreed to deliver up all securities in his possession under which he claimed any debt against the estate of *J. W.*, deceased, to execute a general release of all claims on the estate of *J. W.* for matters between Plaintiff and *J. W.* to the day of his decease, and between the trustees and representative of *J. W.* to the date of the agreement, except 600*l.* and interest due on a bond given by *J. W.* which Defendant agreed to pay to the person entitled thereto. In *assumpsit* stating mutual promises to perform the agreement, Plaintiff averred that he was ready and willing to deliver up all securities under which he claimed any debt against the estate of *J. W.* deceased, and to execute a general release of all claims on the estate of *J. W.* for matters between the Plaintiff and *J. W.* deceased, to the day of his decease, and assigned for breach non-payment of the 1500*l.* and 600*l.* or either of them: held that the release described in the declaration was not co-extensive with that agreed to be given, and that this defect could not be cured by a verdict. *Smith* v. *Woodhouse*, *in Error*, *T.* 46 *G.* 3.

2 N. R. *page* 233

35. But that in this case it appeared that the payment of the money was intended to precede the release, and therefore the averment was not necessary, and the declaration well enough. *ibid.* *ibid.*

36. *Indebitatus assumpsit* for board, schooling, clothes, &c. with a count on a quantum meruit for the same; and also a count stating that in consideration that the Plaintiff had taken *J. W.* as a scholar into an academy kept by him, and that he had left it without having given due notice, the Defendant promised to pay so much as the Plaintiff reasonably deserved to have: held that under these counts the Plaintiff was intitled to recover for a quarter over the time which *J. W.* stayed on the ground of a quarter's notice not having been given, that being one of the terms upon which he was taken. *Eardley* v. *Price*, *M.* 47 *G.* 3.

2 N. R. 338

37. Debt

37. Debt on bond conditioned for payment of an annuity of 175*l.* quarterly during the life of lady *G.*; pleas, payment of the annuity at the days, and payment of the arrears after the days in the condition. Replication, that the Defendant did not pay the annuity or the arrears in manner and form as Defendant alleged, but on the contrary Plaintiff suggested that during the life of lady *G.* 87*l.* 10*s.* for two quarterly payments became due and was still in arrear, and concluded to the country. On demurrer the Court seemed to think the replication bad, and gave the Defendant leave to amend on payment of costs. *De La Rue* v. *Stewart*, *M.* 47 *G.* 3.

2 N. R. *page* 362

38. Declaration stated that *H. S.* being possessed of land on which hops were growing, agreed to sell to *J. W.* all the hops then growing on the said land at 10*l.* per cwt. to be paid by *F. W.* to *H. S.*, to be delivered in pockets by the said *H. S.* to *F. W.* at *Whitstable* in *Kent*; that in consideration that *F. W.* undertook to accept and pay for the hops *H. S.* promised to deliver them at the place and manner aforesaid in a reasonable time next after they should be picked and gathered; that the hops were picked and gathered, and amounted to two cwt.; and although a reasonable time for delivery had elapsed, and although said *F. W.* was during that time and afterwards ready and willing to accept and pay for the hops at the rate and in manner, &c. yet *H. S.* had not delivered them: held first, that the sale of hops growing on the land was not illegal, it not being averred, that they were bought to sell again; and, secondly, that it was not necessary for the Plaintiff to aver any request or notice to deliver at any particular time, or any tender of the price, it appearing that the first act was to be done by the vendor. *Bristow and Others, Executors*, &c. v. *Waddington and Others, in Error*, *M.* 47 *G.* 3.

2 N. R. *page* 355

VI. *Of Title.*

1. The reversion of lands demised to the Defendant for years is conveyed to *A.* and *B.* and the heirs of *B.* in trust for *A.* and his heirs; *A.* declares singly on a covenant contained in the lease; and after setting out the above title *without averring the death of B.* states himself to be "thereby seized of the reversion in his demesne as of fee." This is bad upon demurrer. *Scott* v. *Godwin*, *T.* 37 *G.* 3.

1 *B.* & *P.* 67

2. If a demandant in a writ of right count upon the seizin of his ancestor, "*in dominico suo ut de feodo*," omitting "*et de jure*," it seems to be bad. *Slade et Ux.* v. *Dowland, in false judgment*, *M.* 42 *G.* 3. 2 *B.* & *P.* 570

3. If the demandant in deducing his title through a female describe her as "sister and heir of *J. S.*," and it appear upon the face of the count that *J. S.* left a son who survived

survived his aunt, it is fatal; although it also appear that upon failure of issue of the son, the issue of the sister of *J. S.* became his heirs. *Slade et Ux.* v. *Dowland*, *M.* 42 *G.* 3. 2 *B. & P. page* 570

4. In the count of a writ of right it is not sufficient to state that the lands descended to four women, as nieces and co-heirs of *J. S.* without shewing how they were nieces. *Dumsday* v. *Sir R. Hughes and Another*, *T.* 43 *G.* 3. 3 *B. & P.* 453

VII. *Of Surplusage.*

1. If a declaration on a bail bond conclude "whereby an action hath accrued to the Plaintiff to demand and have of the *principal* (instead of the bail) and that the *principal* hath not paid, &c." it is bad on special demurrer, for these words cannot be rejected as surplusage. *Morgan* v. *Sargent*, *T.* 37 *G.* 3. 1 *B. & P.* 58

2. If the replication to a plea in abatement of the writ begin "that the said declaration ought not to be quashed," but conclude properly, it is well enough, for such words may be rejected as surplusage. *Sabine* v. *Johnstone*, *T.* 37 *G.* 3. 1 *B. & P.* 60

VIII. *What cured by Verdict.*

(*See* ANTE, iv. 6. v. 29. 33, 34.)

1. A declaration stated that in consideration that the Plaintiff had sold to the Defendant a *certain horse* of the Plaintiff, at and for a *certain quantity of certain oil*, to be delivered within a *certain time*, which had elapsed before the commencement of the suit, the Defendant promised to deliver the said oil accordingly: held well enough after verdict. *Ward* v. *Harris*, *T.* 40 *G.* 3. 2 *B. & P. page* 265

2. If to an avowry for 120*l.* rent in arrear, the Plaintiff plead "that the said 120*l.* is not due," and the Defendant join issue thereon, and at the trial it appear that 24*l.* only is due upon which the Plaintiff objects that the evidence does not support the issue joined by the Defendant; yet if a verdict be taken for 24*l.* subject to the opinion of the Court, such finding will cure the defect in the formality of the issue. *Cobb* v. *Bryan*, *H.* 43 *G.* 3. 3 *B. & P.* 348

PLEDGE,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 1, 2, 3.

PLEDGES,

See REPLEVIN, No. 1. 5.

POLICY,

See INSURANCE.

POSTEA,

See ARBITRATION, No. 6.

POST OFFICE,

See FRANKING. STAMPS, No. 4.

1. It seems that it is not a felony within 7 *G.* 3. *c.* 50. *s.* 1. for a person employed in the Post Office to steal out of a letter, entrusted

to his care, a draft on a *London* banker, purporting to be drawn in *London*, but actually drawn above 10 miles from *London* on unstamped paper. *The King* v. *Pooley*, *H.* 43 *G.* 3. 3 *B.* & *P. page* 314

2. It seems also that *s.* 2. of the same act does not apply to persons employed in the post office; and that a person of that description therefore, who steals a letter out of the post office, is not guilty of felony under that section. *ibid. ibid.*

POSSESSION,

See PLEADING, v. 13. 27.

POWER,

See AUTHORITY.

If an estate in fee be devised to a feme covert, with a power annexed to dispose of the estate without the controul of her husband, such power is void, being inconsistent with the fee given in the first instance. *Goodhill* v. *Brigham*, *H.* 38 *G.* 3. 1 *B.* & *P.* 192

PRACTICE,

See AFFIDAVIT. AFFIDAVIT TO HOLD TO BAIL. AMENDMENT. ARBITRATION, No. 1, 2, 3. ARREST. ATTACHMENT. BAIL. BAIL-PIECE. BANKRUPT. BARON AND FEME. BOND. COSTS. COURTS. DISTRINGAS. EJECTMENT. ESCAPE, No. 4. EXCHEQUER CHAMBER, No. 3. INSOLVENT. INTEREST OF MONEY. JUDGMENT. LUNATIC, No. 1, 2. MISNOMER, No. 4. PARTNERS. PAYMENT OF MONEY INTO COURT. PENAL ACTIONS. PRISONER, No. 6. PROCESS. REPLEVIN. RIGHT, WRIT OF. TENDER. TRIAL. USURY, No. 3. VARIANCE. VENDITIONI EXPONAS. VENUE. VERDICT. WARRANT OF ATTORNEY.

I *Relative to Process.*
II. ——— *Arrest, Detainer, Bail, and Appearance.*
III. ——— *Pleadings, and Bill of Particulars.*
IV. ——— *Trial, Inquiry, and Evidence.*
V. ——— *Judgment and Reference to the Prothonotary.*
VI. ——— *Execution.*
VII. ——— *Staying and setting aside Proceedings.*
VIII. ——— *Costs.*
IX. ——— *Waver of Irregularity.*
X. ——— *Writ of Error.*

I. *Relative to Process.*

See TIME, No. 3. VARIANCE.

1. Defendant before the action commenced quitted the kingdom, leaving another in possession of his house and goods; Plaintiff having served a summons to appear at the house distrained the goods to compel an appearance; and held regular. *Sir W. Staines, Knight, and Another*, v. *Johannot*, *H.* 38 *G.* 3. 1 *B.* & *P. page* 200

2. A Defendant must take advantage of an irregularity in the writ before appearance. *Fox and another* v. *Money*,

Money, E. 38 G. 3.
1 B. & P. page 250

3. If a *distringas* be returnable on the last day of Term, the Plaintiff at the rising of the Court may move to increase issues on the *alias* or *pluries*, *distringas* to be issued thereupon on the following day, in case no appearance shall then have been entered. *Reg. Gen. T.* 38 G. 3. 1 B. & P. 312

4. So where issues have been levied on such *distringas*, he may at the rising of the court move for leave to sell the issues to pay the costs of the *distringas*. *ibid. ibid.*

5. If a *capias* per continuance be tested on the same day as the original *capias*, a new original *capias* may be sued out to warrant it, though such new original bear teste before cause of action accrued. *Davis*, *One*, &c. *Assignee of the Sheriff* v. *Owen and another*, M. 39 G. 3. 1 B. & P. 342

6. A *capias ad respondendum* against bail was tested of a day, prior to the return of the *ca. sa.* against the principal, but was not in fact sued out till afterwards: held regular. *Pinero* v. *Wright*, T. 40 G. 3.
2 B. & P. 235

7. The day inserted in a notice to appear to a common *capias* must be the return day of the writ. *Rushton* v. *Chapman*, M. 41 G. 3.
2 B. & P. 340

8. The Court will not set aside proceedings and order the bail bond to be delivered up because a Defendant has been arrested on a special *capias*, in which as well as in the affidavit to hold to bail the initials only of the Christian name were inserted. *Howell* v. *Coleman*, T. 41 G. 3.
2 B. & P. page 466

9. The Court will not open the rule for an attachment on the mere affidavit of the party, that he has not been served; at least unless he shew some mistake in the service. *Hopley* v. *Grunger*, E. 45 G. 3.
1 N. R. 256

10. A *testatum capias*, having been made returnable on a day certain instead of a general return day, was held irregular. *Inman* v. *Huish*, H. 46 G. 3. 2 N. R. 133

11. A *capias* directed to the sheriff of *Middlesex* cannot be served in *London*. *Willis* v. *Pendrill*, H. 46 G. 3. 2 N. R. 167

II. *Relative to Arrest, Detainer, Bail, and Appearance.*

See ALIEN. BAIL II. LUNATIC, No. 1. VARIANCE, No. 11.

1. It is in the discretion of the Court to put a Defendant under terms who moves to have the issues levied under several *distringas*'s restored to him on his appearance according to 10 G. 3. c. 50. s. 4. *Cazalet* v. *Dubois*, T. 37 G. 3.
1 B. & P. 81

2. If a Defendant be holden to bail under a Judge's order, a material fact being concealed from the Judge, which would probably have induced him to refuse the order; the Court will on application discharge the Defendant, even though there was a sufficient affidavit of debt, independent of the order.

Davis v. *Chippendale*, *M.* 41 *G.* 3.
2 *B.* & *P. page* 282

3. But they will not discharge him from a detainer lodged against him by a third person while in custody under the Judge's order. *ibid. ibid.*

4. If a Defendant being arrested upon process in K. B. give a warrant of attorney to confess judgment, and be afterwards holden to bail in *C. B.* in an action upon that judgment, the Court will discharge him upon a common appearance. *Salkeld* v. *Lands*, *E.* 41 *G.* 3.
2 *B.* & *P.* 416

5. If a Defendant accept a declaration, and act as if an appearance has been entered for him, the Court will not permit him to set aside a judgment for want of an appearance having been entered. *Williams* v. *Strahan*, *T.* 45 *G.* 3.
1 N. R. 309

III. *Relative to Pleadings and Bill of Particulars.* (See *Post*, IX. 5.)

BAIL, ii. 17. COSTS, i. 11. COURTS, No. 5. EVIDENCE, ii. 17. OYER. PRISONER, No. 8.

1. It is not sufficient to stick up a notice of declaration in the office, if the Defendant's last place of abode be known; for it ought to be served there. *Holsten* v. *Culliford*, *H.* 38 *G.* 3. 1 *B.* & *P.* 214

2. To *assumpsit* on a bill of exchange, the Court will not allow a Defendant to plead the general issue, and that the bill was given on a stock-jobbing transaction contrary to 7 *G.* 2. *c.* 8. *Shaw* v. *Everett*, *H.* 38 *G.* 3. 1 *B.* & *P.* 222

3. Nor the general issue and alien enemy to a declaration on a policy of insurance. *Angerstein* v. *Vaughan*, *H.* 38 *G.* 3.
1 *B.* & *P. page* 222. *n.*

4. A Defendant cannot demand a bill of particulars till after appearance. *Kitchin* v. *Blanchard*, *H.* 39 *G.* 3. 1 *B.* & *P.* 378

5. The Court will not on motion strike out a part of a plea which contains double matter. *Griffiths* v. *Eyles*, *E.* 39 *G.* 3.
1 *B.* & *P.* 413

6. A replication taking issue on a plea of payment to debt on an annuity bond, must be signed by a serjeant. *Ellis and Wife* v. *Govey*, *T.* 39 *G.* 3. 1 *B.* & *P.* 469

7. In an order to enlarge the time for pleading, the first and last days are both reckoned inclusively. *Freeman* v. *Jackson*, *E.* 36 *G.* 3.
1 *B.* & *P.* 479

8. The Court will allow *non est factum* and usury to be pleaded together to debt on bond. *Lechmere* v. *Rice*, *M.* 40 *G.* 3. 2 *B.* & *P.* 12

9. In *C. B.* notice of declaration is not necessary in bailable actions. *Holin* v. *Burgus*, *M.* 40 *G.* 3.
2 *B.* & *P.* 42

10. The Court will not allow *non assumpsit* and alien enemy to be pleaded together. *Thyatt* v. *Young*, *H.* 40 *G.* 3. 2 *B.* & *P.* 72

11. A joinder in demurrer must be signed by a serjeant. *Brooker* v. *Simpson*, *M.* 41 *G.* 3.
2 *B.* & *P.* 336

12. If a declaration be indorsed "to plead in ——," it must be understood to mean within the number of

of days allowed by the rules of the Court. *Hifferman* v. *Langelle*, *H.* 41 *G.* 3. 2 *B. & P. page* 363

13. A defendant who is under terms to plead issuably, is not at liberty to take advantage of any objections upon special demurrer, of which he could not have availed himself upon general demurrer. *Bell* v. *Da Costa*, *E.* 41 *G.* 3. 2 *B. & P.* 416

14. The Defendant in replevin having averred in his cognizance that the Plaintiff held the land under "a certain demise to him the said *J. L.* (the Plaintiff) theretofore made;" the Plaintiff pleaded in bar, that he did not hold under a demise in manner and form. Upon this Defendant obtained an order to amend, by striking out the words "to him the said *J. L.*" with liberty to the Plaintiff to plead *de novo*, and that in case the Plaintiff should plead new matter, the Defendant should pay all costs of the amendment. The defendant having amended accordingly, the Plaintiff demurred specially, and assigned for cause that it did not appear to whom the demise was made: held, that the demurrer was not new matter. *Lees* v. *Wurltcrs*, *T.* 41 *G.* 3. 2 *B. & P.* 465

15. In an action of trespass, directed by the Lord Chancellor to try a question of bankruptcy, the Court of *C. B.* will not restrain the Defendant from pleading the general issue, together with special justifications. *M'Connell* v. *Hector*, *M.* 42 *G.* 3. 2 *B. & P.* 549

16. All arguments upon demurrers and other arguments in this Court are to be heard on *Mondays* and *Thursdays* only. *Regula Generalis*, *H.* 42 *G.* 3. 3 *B. & P. page* 110

17. In *C. B.* a plea of bankruptcy must be signed by a serjeant. *Pitcher* v. *Martin*, *E.* 42 *G.* 3. 3 *B. & P.* 171

18. A summons for further time to plead not attended by the party taking it out, does not wave the necessity of a rule to plead. *Decker* v. *Shedden*, *T.* 42 *G.* 3. 3 *B. & P.* 180

19. In an action of *assumpsit* for non-performance of a contract for the sale of a house, with counts to recover back the deposit, the Plaintiff having in his first count alleged, that the Defendant, who was to make a good title, had delivered an abstract which was "insufficient, defective and objectionable," the Court obliged the Plaintiff to give a particular of all objections to the abstract arising upon matters of fact. *Collett* v. *Thompson*, *M.* 43 *G.* 3. 3 *B. & P.* 246

20. If to a rejoinder concluding with a verification the Plaintiff add the *similiter* and take the record down to trial, and the Defendant obtain a verdict, the Court will not grant a new trial, but will amend the record. *Grundy* v. *Mell*, *E.* 44 *G.* 3. 1 N. R. 28

21. When time to plead has been obtained, if the Defendant plead and give a rule to reply, before the expiration of such time, the rule to reply will be of no avail unless he give notice of his plea. *Gandy* v. *Borrow-*

Borrowdale, E. 45 *G.* 3.
1 N. R. *page* 273

22. Where the Defendant and his attorney had been informed that a notice of declaration was stuck up in the office, the Court refused to set aside a judgment for want of service of the notice at the Defendant's last place of abode. *Losemore* v. *Cohen, E.* 45 *G.* 3.
1 N. R. 279

23. Notice of declaration for *Saturday, Sunday* being the essoign day of the term, held a nullity. *Moffat* v. *Carter, M.* 46 *G.* 3.
2 N. R. 75

24. If a declaration be delivered, indorsed "delivered conditionally," a rule to plead given, and a demand of plea served, and judgment be signed for want of a plea, the Court will set it aside as irregular, there being no notice to plead. *Heath* v. *Rose, T.* 46 *G.* 3.
2 N. R. 223

25. If one of three Defendants in a joint action appear to a *quare clausum fregit*, and the two others, being arrested on bailable process, have till the ensuing term to justify bail, and the Plaintiff previous to that time deliver a declaration against all three, indorsed "conditionally until special bail is perfected," this is irregular. *Turner* v. *Portall and Others, T.* 46 *G.* 3.
2 N. R. 231

26. *Quære.* Whether if the declaration had been indorsed conditionally until bail shall be perfected by the two latter defendants, it would have been irregular? *ibid. ibid.*

27. One of two Defendants having been holden to bail in *Trin.* term, the Plaintiff proceeded to outlawry against the other, and delivered a declaration against the former on the first day of *E.* term, not having obtained a rule for time to declare; held, that the cause was out of court, and the bail entitled to an *exoneretur*. *Sykes* v. *Bauwens and Another, E.* 47 *G.* 3.
2 N. R. *page* 404

28. A declaration cannot be filed conditionally after the time for the Defendant's appearance has expired, whether the process be bailable or not bailable. *Kenman* v. *Bean, T.* 47 *G.* 3. 2 N. R. 433

IV. *Relative to Trial, Inquiry, and Evidence.*

See New Trial. Verdict, No. 2.

I. The Court will not put off a trial at the instance of the Defendant, on account of the absence of a material witness, if he has conducted himself unfairly, or been the cause of any improper delay. *Saunders* v. *Pittman, E.* 37 *G.* 3. 1 *B.* & *P.* 33

2. The Court of *C. B.* will make the payment of costs for not proceeding to trial a term of discharging a rule for judgment as in case of a nonsuit. *Jolliffe* v. *Morris, E.* 37 *G.* 3. 1 *B.* & *P.* 38

3. The Court will not, by putting off a trial, or other indirect means, compel a party to consent to a commission for the examination of witnesses in *Scotland*. *Calliand* v. *Vaughan, H.* 38 *G.* 3.
1 *B* & *P.* 210

4. Where contradictory verdicts have been found on a policy of insurance, and a third action brought against another underwriter, the Court will not

not put off the trial to enable him to apply to a court of equity for a commission to examine witnesses in *Scotland* to the same facts which were given in evidence on the last trial. *Calliand* v. *Vaughan*, *H.* 38 *G.* 3.
1 *B.* & *P. page* 210

5. At least, if he has obtained time to plead on the usual terms. *ibid. ibid.*

6. The Court will not make a rule on a Plaintiff who brings an action on a bond. to allow an officer of the stamp-duties to inspect the bond, because the Defendant suspects it to be forged. *Chetwind* v. *Marnell*, *Executor*, &c. *E.* 38 *G.* 3.
1 *B.* & *P.* 271

7. If notice of a writ of inquiry to be executed at a particular hour and place be continued, the notice of continuance need not express any hour or place. *Jones* v. *Chunc*, *One*, &c. *H.* 39 *G.* 3.
1 *B.* & *P.* 363

8. The Court will not put off a trial on account of the absence of a material witness, if by his evidence the defence of slavery is intended to be established. *Robinson* v. *Smyth*, *T.* 39 *G.* 3. 1 *B.* & *P.* 454

9. If issue be joined on one of three pleas, and judgment be entered by default upon the two others, the Plaintiff cannot execute a writ of inquiry on those pleas on which he has judgment, but must award jury process *tam ad triandum quam ad inquirendum*. *Dicker* v. *Adams*, *E.* 40 *G.* 3. 2 *B.* & *P.* 163

10. Notice having been given of executing a writ of inquiry on "*Tuesday*, the 14th day of *January* instant," when the 14th of *January* fell on a *Thursday*, and on which day the writ of inquiry was executed: the Court of *C. B.* refused to set aside the execution of the writ of inquiry for this irregularity, but rejected "*Tuesday*" as surplusage, it appearing that the Defendant was not misled thereby. *Batten* v. *Harrison*, *H.* 42 *G.* 3.
3 *B.* & *P. page* 1

11. If a Defendant die the night before the trial of a cause at the sittings in term, a verdict obtained in such cause, and the judgment entered up thereon, will be set aside upon application to the Court. *Taylor* v. *Harris*, *M.* 44 *G.* 3.
3 *B.* & *P.* 549

V. *Judgment, and Reference to the Prothonotary*, (see *ante*, ii. 5).

See ADDITIONS. BAIL, ii. 6. BARON AND FEME, No. 8. BILL OF PARTICULARS. EVIDENCE, ii. 14. JUDGMENT, No. 2, 3. MISNOMER, No. 4. PRISONER, No. 8.

1. The Court will set aside a regular judgment on an affidavit of merits, though bankruptcy is intended to be pleaded. *Evans* v. *Gill*, *T.* 37 *G.* 3. 1 *B.* & *P.* 52

2. The Court will not allow a Defendant to strike out the entry of a judgment of *nolle prosequi* entered by the Plaintiff on one of the counts of the declaration after it has been demurred to. *Milliken* v. *Fox and Another*, *M.* 38 *G.* 3.
1 *B.* & *P.* 157

3. The Court will not restrain a Defendant from pleading the statute of limitations on setting aside a regular interlocutory judgment. *Mad-*

Maddocks v. *Holmes and Others*, *E.* 38 *Geo.* 3.
1 *B. & P. page* 228

4. The Court will not allow a Plaintiff to sign judgment because the Defendant refuses to pay for half the paper-books delivered to the Judges; this case being within the rule, *H.* 35 *G.* 3. which directs that no judgment shall be signed for non-payment of issue-money. *Fulham* v. *Bagshaw*, *T.* 38 *G.* 3.
1 *B. & P.* 292

5. Plaintiff cannot sign judgment for want of a plea without demanding one, though Defendant has neglected to take the declaration out of the office. *White* v. *Dent*, *M.* 39 *Geo.* 3. 1 *B. & P.* 341

6. Where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shewn as cause against referring the note to the prothonotary. *Pell* v. *Brown*, *H.* 39 *Geo.* 3.
1 *B. & P.* 369

7. The Defendant may rule the Plaintiff to enter the issue and move for judgment as in case of a nonsuit in the same term. *Peeters* v. *Throgmorton*, *E.* 39 *Geo.* 3.
1 *B. & P.* 387

8. If a Plaintiff after entering up judgment for himself upon two counts, discover an error in one of them, he may wave his judgment on that count, and enter it for the Defendant. *Spicer* v. *Teasdale*, *M.* 40 *G.* 3. 2 *B. & P.* 49

9. The Court of *C. B.* will refer a bill of exchange to the prothonotary, to compute principal, interest, *exchange*, *re-exchange*, and costs. *Goldsmid and Others* v. *Taite and Another*, *M.* 40 *G.* 3.
2 *B. & P. page* 55

10. But not to compute charges and expences *ibid. ibid.*

11. The Defendant being arrested on a writ returnable the last return of *Michaelmas* term, put in bail on the last day of that term, who justified on the first day of *Hilary* term; a declaration was delivered on the third day of *Hilary* term, and in the same term judgment was signed for want of a plea: held regular, the Defendant not being entitled to an imparlance. *Bailey* v. *Hantler*, *H.* 40 *G.* 3.
2 *B. & P.* 126

12. If the writ by which a replevin is removed be returnable on the first return of the term, and the Plaintiff do not declare within four days before the end of that term, the Defendant is entitled to an imparlance, though he has not appeared within the term. *Thompson* v. *Jordan*, *E.* 40 *G.* 3.
2 *B. & P.* 137

13. When the Plaintiff enters an appearance for the Defendant under the statute, judgment may be signed without any demand of a plea. *North* v. *Lambert*, *T.* 40 *G.* 3.
2 *B. & P.* 218

14. To a replication of *nul tiel* record and day given, if the Defendant demurs the Plaintiff need not join in demurrer; but if the record is not produced may sign judgment. *Tipping* v. *Johnson*, *M.* 41 *G.* 3.
2 *B. & P.* 302

15. The rule that final judgment cannot be signed till four days after the return of the *habeas corpore juratorum*, does not extend to the case where

where the term closes before the four days are expired. *Thomas* v. *Ward*, *E.* 41 *G.* 3.
2 *B.* & *P. page* 393

16. If an appearance be entered in the name of an agent to the attorney for the Defendant, and the plea be delivered in the name of the attorney, and the Plaintiff thereupon enter up judgment for want of a plea, the Court will set aside that judgment for irregularity. *Buckler* v. *Rawlins*, *E.* 42 *G.* 3. 3 *B.* & *P.* 111

17. If a declaration in debt demand 2000*l.*, and contain several counts, each of which state a debt of 224*l.* 7*s.* 4½*d.*, and the Defendant plead thereto that he does not owe the said sum of 224*l.* 7*s.* 4½*d.*, the Plaintiff may sign judgment for want of a plea. *Macdonnell* v. *Macdonnell*, *T.* 42 *G.* 3.
3 *B.* & *P.* 174

18. If after the time for pleading is out, but before judgment signed by the Defendant, the Court on his application stay proceedings till the Plaintiff give security for costs, to be approved by the prothonotary, the Plaintiff though he give security *instanter*, which is accepted by the Defendant, is not at liberty to sign judgment before the opening of the office on the next morning. *Decker* v. *Thompson* *H.* 43 *G.* 3. 3 *B.* & *P.* 319

19. A Plaintiff having tendered an issue to a plea, and demanded a rejoinder, where the defendant was under terms to rejoin *gratis*, the Court held the judgment regular, but set it aside without costs, because the Plaintiff might have added the *similiter* himself. *Wye* v. *Fisher*, *T.* 43 *G.* 3.
3 *B.* & *P. page* 443

20. If judgment of *non pros* be signed after a summons for time to enter the issue is returnable, the Court will set it aside, for the summons when returnable is a stay of proceedings. *Anthill q. t.* v. *Metcalf*, *H.* 46 *G.* 3. 2 N. R. 169

21. Trespass against *B.*, *C.* and *D.* for turning *A.* out of his house, and keeping the house and goods from him; plea, that *A.* had nothing in the said house and goods but "jointly and undividedly with *D.*" Judgment signed for want of a plea, and held right. *Hopgood* v. *Wright and Others*, *E.* 46 *G.* 3.
2 N. R. 188

22. Costs for not proceeding to trial and judgment as in case of a nonsuit may both be moved for in the same term. *Dorant* v. *Rouvellet*, *T.* 46 *G.* 3. 2 N. R. 247

23. Plaintiff is not entitled to sign judgment for want of a plea till the expiration of 24 hours after the delivery of a bill of particulars, though the time for pleading be out, and a demand of a plea given, above 24 hours before that time. *Ramsay* v. *Lord Reay*, *M.* 47 *G.* 3. 2 N. R. 361

24. If Plaintiff give notice of trial for the sittings in the term in which issue is joined, and do not proceed to trial accordingly, the Defendant may move for judgment as in case of a nonsuit in the succeeding term. *Hay* v. *Howell and Others*, *H.* 47 *G.* 3. 2 N. R. 397

VI. *Rela-*

VI. *Relative to Execution*, (see *post*, x. 6.)

See ATTORNEY, No. 4. EXECUTION. PRISONER. VENDITIONI EXPONAS.

1. If a *fi. fa.* be tested before Defendant's death, but delivered to the sheriff and executed after, the execution is regular. *Waghorne* v. *Langmead*, *M.* 37 *G.* 3, (*Vid. et Bragner* v. *Langmead*, 7 *Term Rep.* 20.) 1 *B. & P. page* 571
2. Same point, *Parsons* v. *Gill*, 13 *W.* 3. *B. R.* (Same case, 7 *Term Rep.* 21. *n.*) *ibid.* 572
3. Defendant having recovered a verdict against the sheriff for seizing his goods under a *distringas* in an action at the suit of *J. S.*, and having given a *cognovit* to the Plaintiff on which a *fi. fa.* issued, the Court refused to order the sheriff to pay over the damages recovered by Defendant against him to the Plaintiff in satisfaction of the *fi. fa.* *Willows* v. *Ball*, *M.* 47 *G.* 3. 2 N. R. 376

VII. *Relative to staying and setting aside Proceedings.*

See BOND, No. 1. CONSIGNOR AND CONSIGNEE, No. 2. COSTS, i. 16. REPLEVIN, No. 3.

1. *C.*, by virtue of an order from *B.* to receive all money due to him on a particular account, obtains three out of four instalments due from *A.* to *B.* on that account; these payments are afterwards questioned by *B.* who brings his action against *A.* for the whole sum, and at the same time *C.* demands the fourth instalment: an application to the Court by *A.* to stay proceedings in the action against him by *B.*, on his paying the fourth instalment to such person as they should appoint, was refused. *Macdonald* v. *Pasley*, *M.* 38 *G.* 3. 1 *B. & P. page* 161
2. If a party proceed against a Defendant by action and indictment, for the same assault, the Court will not compel him to make his election. *Jones* v. *Clay*, *H.* 38 *G.* 3. 1 *B. & P.* 191
3. The Court of *C. B.* will not stay proceedings in an action on an attorney's bill brought subsequent to the order of a Judge of another Court for its taxation, but previous to that taxation having taken place. *Steventon, One, &c.* v. *Watson and Others*, *H.* 39 *G.* 3. 1 *B. & P.* 365
4. If *A.* and *B.* having recovered in separate actions for libels against different parties engaged in the management and publication of the same newspaper, commence fresh actions against the same parties, each suing that party, against whom the other has recovered, the Court will not interfere in a summary way to set aside the latter proceedings. *Martin* v. *Kennedy*, *H.* 40 *G.* 3. 2 *B. & P.* 69
5. The Court will not stay proceedings in an action on the ground of a bill depending in Chancery for the same cause. *Murphy* v. *Cadell*, *E.* 40 *G.* 3. 2 *B. & P.* 137
6. The Court will not set aside proceedings and order the bail bond to be delivered up, because a Defendant has been arrested on a special *capias*, in which as well as in the affidavit to hold to bail the initials only

only of his Christian name were inserted. *Howell* v. *Coleman*, *T.* 41 *G.* 3. 2 *B.* & *P. page* 466

7. The judgment in an original action and the judgments in the actions against the bail, may be set aside upon one motion and one affidavit entitled in the original action. *Winder* v. *Wood*, *E.* 42 *G.* 3. 3 *B.* & *P.* 118

8. The Court will not stay proceedings in replevin upon payment of costs on the application of the defendant. *Hodgkinson* v. *Snibson*, *H.* 44 *G.* 3. 3 *B.* & *P.* 603

VIII. *Relative to Costs.*
(*See* Costs.)

1. If a *nolle prosequi* be entered on one of the counts of a declaration after demurrer, the Court will not in that stage of the proceedings determine a question of costs respecting such a count. *Milliken* v. *Fox and Another*, *M.* 38 *G.* 3. 1 *B.* & *P.* 157

2. If a Defendant pay a sum of money into Court, and obtain an order to stay proceedings on payment of that sum and costs, and omit to pay the costs when taxed, the Plaintiff after taking the money out of Court, may proceed without a previous demand of the costs. *B. Smith* v. *G. Smith*, *T.* 47 *G.* 3. 2 N. R. 473

IX. *Relative to Waver of Irregularity. See ante*, 1, 2.

1. Taking out a summons before a judge to stay proceedings on the bail-bond is a waver of any irregularity in the notice of declaration. *Davis, One, &c. Assignee of the Sheriff* v. *Owen and Another*, *M.* 39 *G.* 3. 1 *B.* & *P. page* 342

2. So taking any step in a cause is a waver of any irregularity. *ibid.* 344

3. Defendant is not obliged to apply to set aside a judgment irregularly obtained for want of a plea, till notice of writ of inquiry. *Moffat* v. *Carter*, *M.* 46 *G.* 3. 2 N. R. 75

4. Bailable process against two, declaration against one only, the Court set aside the declaration for irregularity, though it had been taken out of the office by him against whom it was filed. *Chapman* v. *Eland*, *M.* 46 *G.* 3. 2 N. R. 82

5. If Plaintiff take a plea out of the office and keep it, he waves any objection to the plea on the ground of its having been pleaded by a new attorney, without any order to change the attorney. *Margerem* v. *Makilwaine*, *T.* 47 *G.* 3. 2 N. R. 509

X. *Relative to Writ of Error.*
(*See* Consolidation Rule. Prisoner, No. 2.)

1. A writ of error operates as a *supersedeas* from the time of the allowance, not from the time of service. *Gravall* v. *Stimpson*, *E.* 36 *G.* 3. 1 *B.* & *P.* 478

2. Bail must therefore be put in within four days from the former period. *ibid. ibid.*

3. The allowance of a writ of error may be served before the Plaintiff is entitled to sign final judgment. *Payne* v. *Whaley*, *E.* 40 *G.* 3. 2 *B.* & *P.* 137

4. If

4. If the Defendant's attorney admit in effect, though not in terms, that a writ of error sued out by him has been brought for delay, the Plaintiff is at liberty to proceed on the judgment. *Miller* v. *Cousins*, *M.* 41 *G.* 3. 2 *B.* & *P. page* 329

5. A writ of error operates as a *supersedeas* from the time of the allowance, though it be not served till after execution. *Meagher* v. *Vandyck*, *H.* 41 *G.* 3. 2 *B.* & *P.* 370

6. The Court will not allow the Plaintiff to take out execution pending a writ of error, merely because the Defendant's attorney has declared that the debt would be settled, and that time was all the Defendant wanted. *Rawlins* v. *Perry*, *T.* 45 *G.* 3. 1 N. R. 307

PREMIUM,

See INSURANCE, ii. 1, 2, 3, 4. iv.

PREROGATIVE,

See AUTHORITY, No. 4.

PRESENTATION,

See QUARE IMPEDIT.

PRINCE OF WALES,

See CONDITION, No. 5.

PRISON BOOKS,

See EVIDENCE, ii. 23.

PRISONER,

See, EVIDENCE, ii. 23. 25. HABEAS CORPUS. INSOLVENT. WARRANT OF ATTORNEY, No. 1.

1. The Court will discharge a Defendant out of custody who is in execution, at the suit of a Plaintiff some time since deceased, on whose part no will has been proved, nor any administration granted, and whose family on notice of a motion for the above purpose declines interfering. *Broughton* v. *Martin*, *M.* 38 *G.* 3. 1 *B.* & *P. page* 176

2. A prisoner after judgment against him, may, notwithstanding the allowance of a writ of Error, be charged in execution. *Fisher* v. *M'Namara*, *T.* 38 *G.* 3. 1 *B.* & *P.* 292

3. The Court has no power to discharge a Defendant out of execution on the ground of a commission of bankruptcy having been issued against him by the Plaintiff. *M'Master* v. *Kell*, *T.* 38 *G.* 3. 1 *B.* & *P.* 302

4. If a Defendant be supersedeable for want of judgment being entered up in time, but not actually discharged, he cannot be detained in an action on the judgment. *Pierson* v. *Goodwin*, *M.* 39 *G.* 3. 1 *B.* & *P.* 361

5. A prisoner in custody on mesne process is supersedeable, unless a copy of the declaration be delivered before the end of the term after the process is returnable. *Blyth* v. *Harrison*, *T.* 36 *G.* 3. 1 *B.* & *P.* 535

6. The Court will not discharge a Defendant out of custody on the ground of the affidavit of the delivery of the declaration not having been filed within 20 days of the delivery, if it be by way of detainer. *Davis* v. *Davenport*, *H.* 40 *G.* 3. 2 *B.* & *P.* 72

7. The

7. The Court will not discharge a prisoner out of execution, because the judgment against him is not docketted and entered upon the rolls of the Court. *Pariente* v. *Castle*, *E.* 40 *G.* 3. 2 *B.* & *P. page* 163

8. If a prisoner be prevented from justifying bail by the Plaintiff desiring further time to enquire into their sufficiency, he is from the time of his notice of justification entitled to a demand of a plea before judgment can be signed against him. *Davies* v. *Chippendale*, *H.* 41 *G.* 3. 2 *B.* & *P.* 367

9. The Court will discharge a Defendant out of custody in execution after the plaintiff's death if it appear that the next of kin do not intend to take out administration, on service of the rule *Nisi* on the next of kin. *Parkinson* v. *Horlock*, *T.* 46 *G.* 3. 2 N. R. 240

PRISONER AT WAR,

See ENEMY. COSTS, iii. 2.

PRIVILEGE,

See ATTORNEY, No. 1, 2. FRANKING.

PRIZE.

1. If goods, the produce of Spain, purchased for *British* subjects resident here, by a neutral agent resident in Spain, partly before hostilities between the two countries, and partly after, and shipped for *England* on board a neutral vessel ostensibly bound for *Ostend*, be taken by a *British* privateer; they are lawful prize, though the ship will be restored. *Louisa Margaretha*, *Henslop*, 3d *April* 1781. 1 *B.* & *P.* 349 *n.*

2. If an admiral, Commander in Chief upon a station, come home by leave of the Admiralty for the re-establishment of his health, leaving the squadron under the command of the flag-officer next in seniority; but retain his commission as Commander in Chief. *Quære*, Whether he be entitled to share in prizes taken by the cruizers of the squadron during his absence? *Lord Nelson* v. *Tucker*, *M.* 43 *G.* 3. 3 *B.* & *P. page* 257

PRIZE-MONEY,

See SEAMEN.

PROCEEDINGS, STAYING AND SETTING ASIDE,

See BAIL, ii. PRACTICE, vii.

PROCESS,

See AFFIDAVIT TO HOLD TO BAIL, No. 22. AMENDMENT, No. 1, 2, 3, 4. 6. 10, 11. EXTORTION. PARTNERS, No. 3, 4, 5. PRACTICE, i. vi. TIME, No. 3. TRESPASS, No. 3, 4. VARIANCE.

PROCTOR,

See COMMON INFORMER. PLEADING, ii. 13. v. 31

PROHIBITION.

1. The Court of Common Pleas has no power to issue an original writ of prohibition to restrain a Bishop from committing waste in the possessions of his see. *Jefferson* v. *The Bishop of Durham and Others*, *M.* 38 *G.* 3. 1 *B.* & *P.* 105

2. At least at the suit of an uninterested person. *ibid.* *ibid.*

3. It seems that no Court of Common Law has that power. *Jefferson* v. *The*

v. *The Bishop of Durham and Others*, *M.* 38 *G.* 3.
1 *B.* & *P. page* 105
4. But it may be doubtful whether the Court of Chancery has not? *ibid. ibid.*

PROMISE.

If one person make a promise to another for the benefit of a third, that third person may maintain an action upon it. *Marchington* v. *Vernon and Others*, *G. II. Sittings*, *T.* 27 *G.* 3. *B. R.*
1 *B.* & *P.* 101 *n.*

PROMISES, *to pay the Debts of third Persons*,

See FRAUDS, STATUTE OF, No. 7.

PROMISSORY NOTES,

See BILLS OF EXCHANGE AND PROMISSORY NOTES. INSOLVENT, No. 5, 6. 12, 13. 17. STAMPS, No. 7.

PROMOTIONS.

Alvanley, Lord. See *Arden*, Sir *R. P.*

Arden, Sir *Richard Pepper*, Knt. Master of the Rolls, appointed Lord Chief Justice of the Common Pleas, and created a peer of *Great Britain* by the title of Baron *Alvanley* of *Alvanley*, in the county palatine of *Chester*, *E.* 40 *G.* 3.
2 *B.* & *P.* 449

Bayley, *John*, Esq. called to the degree of Serjeant at Law, *T.* 39 *G.* 3.
1 *B.* & *P.* 470

Best, *William Draper*, Esq. called to the degree of Serjeant, *H.* 40 *G.* 3. 2 *B.* & *P.* 126

Best, Serjt. promoted to the rank of King's Serjeant, *E.* 47 *G.* 3.
2 N. R. 379

Chambre, *Alan*, Esq. called to the degree of Serjeant at Law, appointed one of the Barons of the Exchequer, *E. Vacation*, 40 *G.* 3.
2 *B.* & *P. page* xiii
And one of the Justices of the Common Pleas, *T.* 40 *G.* 3.
2 *B.* & *P.* 275

Cockell, Serjt. promoted to the rank of King's Serjeant, *T.* 36 *G.* 3.
1 *B.* & *P.* 550

Eldon, Lord Chief Justice of the Common Pleas, appointed Lord High Chancellor of *Great Britain*, *H.* 40 *G.* 3. 2 *B.* & *P.* 380
(See *Scott*, Sir *John.*)

Ellenborough, Lord. See *Law*, Sir *Edward.*

Graham, *Robert*, Esq. Attorney-General to the Prince of *Wales*, called to the degree of Serjeant at Law, and appointed one of the Barons of the Exchequer, *T.* 40 *G.* 3.
2 *B.* & *P.* 276

Grant, *William*, Esq. Chief Justice of *Chester*, appointed Solicitor-General, and Knighted. 2 *B.* & *P.* xiii
And appointed Master of the Rolls, *E.* 40 *G.* 3. 2 *B.* & *P.* 449

Law, *Edward*, Esq. appointed Attorney-General to his Majesty and Knighted, *H.* 40 *G.* 3. 2 *B.* & *P.* 380
Called to the degree of Serjeant at Law, made Lord Chief Justice of the King's Bench, and created a Peer of the United Kingdom of *Great Britain* and *Ireland*, by the title of Lord *Ellenborough*, Baron of *Ellenborough*, in the county of *Cumberland*, *E.* 42 *G.* 3.
3 *B.* & *P.* 111

Le Blanc, Serjt. appointed one of the Justices of the King's Bench, *T.* 39 *G.* 3. 1 *B.* & *P.* 469

Lens,

Lens, John, Esq. called to the degree of Serjeant at Law, *T.* 39 *G.* 3. 1 *B. & P. page* 470
Promoted to the rank of King's Serjeant, *E.* 46 *G.* 3. 2 N. R. 379
Mansfield, James, Esq. called to the degree of Serjeant at Law, and appointed Lord Chief Justice of the Common Pleas, and Knighted, *Hilary Vacation*, 44 *G.* 3.
Mitford, Sir *John*, his Majesty's Solicitor-General, appointed Attorney General, 2 *B. & P.* xiii
Elected Speaker of the House of Commons, *H.* 41 *G.* 3. 2 *B. & P.* 380
Onslow, Arthur, Esq. called to the degree of Serjeant at Law, *T.* 40 *G.* 3. 2 *B. & P.* 276
Percival, Hon. *Spencer*, appointed Solicitor General to his Majesty, *H.* 40 *G.* 3. 2 *B. & P.* 380
And Attorney General, *E.* 42 *G.* 3. 3 *B. & P.* 111
Praed, William Mackworth, called to the degree of Serjeant at Law, *H.* 41 *G.* 3. 2 *B. & P.* 449
Scott, Sir *John*, Knight, his Majesty's Attorney General, called to the degree of Serjeant at Law, appointed Lord Chief Justice of the Court of Common Pleas, and created a Peer of *Great Britain* by the title of Baron *Eldon* of *Eldon*, in the county Palatine of *Durham*, *T. Vacation*, 40 *G.* 3. 2 *B. & P.* xiii
(See *Eldon*, Lord.)
Sellon, John Baker, called to the degree of Serjeant at Law, *E.* 38 *G.* 3. 1 *B. & P.* 279
Shepherd, Samuel, Esq. called to the degree of Serjeant at Law, *E.* 36 *G.* 3. 1 *B. & P.* 530
Promoted to the rank of King's Serjeant, *T.* 36 *G.* 3. 1 *B. & P. page* 550
Sutton, Thomas Manners, Esq. Solicitor General to the Prince of *Wales*, appointed Solicitor General to his Majesty, and Knighted, *E.* 42 *G.* 3. 3 *B. & P.* 111
Vaughan, John, Esq. called to the degree of Serjeant at Law, *H.* 39 *G.* 3. 1 *B. & P.* 385
Williams, Serjt. promoted to the rank of King's Serjeant, *E.* 44 *G.* 3. 2 N. R. 171

PURCHASER,

See TITLE.

Q.

QUARE IMPEDIT.

1. In *quare impedit* the Defendant pleaded that one *M. O.*, under whom he claimed, being seised in fee of one moiety of the advowson to present to one turn in every two turns, presented one *J. O.* in her proper turn; that the church being afterwards vacant, one *J. W.*, under whom the Plaintiff claimed, presented in his proper turn; that the church being again vacant, the Plaintiff presented; and that the church being a fourth time vacant, it belonged to the Defendant to present. On demurrer to his plea, the Court held that the Defendant had not shewn a title to present, since he had not shewn whether the third presentation was by usurpation or by agreement, and that it could not be presumed that the Defendant was entitled to present

in the first and fourth turns, and the Plaintiff in the second and third, since the plea averred that *M. O.* had presented to the first turn in her proper turn, and *J. W.* in his proper turn. *Birch* v. *The Bishop of Litchfield and Coventry*, *T.* 43 *G.* 3. 3 *B. & P. page* 444

2. *Semb.* That if it had appeared by the plea that the Plaintiff had presented to the third turn by usurpation, he would still have been entitled to the fourth turn by right. *ibid. ibid.*

R.

RACE,

See WAGER.

RATE,

See LAND TAX. TAXES.

1. The Masters in Chancery are not rateable as occupiers of their respective apartments in *Southampton Buildings* under the paving act 11 *G.* 3. *c.* 22. *Holford* v. *Copeland*, *E.* 42 *G.* 3. 3 *B. & P.* 129

2. Held that they were rateable to the house tax by nine Judges 18th *November* 1779. 3 *B. & P.* 135 *n.*

3. Also to the windows and house duty by the Judges, 17th *June* 1798. *ibid. ibid.*

4. Commissioners under an act of Parliament directing them yearly and every year, to rate, charge, tax, and assess, certain lands, for a certain number of years, having omitted to make any rate or assessment for several years; at length made an assessment for one year, and added to it the arrears of the past years, and levied for the assessment so made, including such arrears: held that no arrears could be due for the years respecting which no assessment had been made, and that the distress was therefore bad. *Newton* v. *Young*, *H.* 45 *G.* 3. 1 N. R. *page* 187

RE-ASSESSMENT,

See TAXES.

RECOGNIZANCE,

See AMENDMENT, No. 2. 4. BAIL, i. 15. 21. ii. 10. v. 2, 3.

RECOVERY,

See COMMON RECOVERY.

RECTORY,

See PLEADING, v. 14.

REFERENCE,

See COSTS, i. 1. PRACTICE, v.

REGISTER,

See SHIP, No. 1, 2.

REGULÆ GENERALES,

See ATTORNEY, No. 3. BAIL, i. 5. 15, 16, 17. ii. 1. INSOLVENT, No. 19. PRACTICE, i. 3, 4. iii. 16. WARRANT OF ATTORNEY, No. 2, 3.

RELEASE,

See BANKRUPT, iii. 14. BOND, No. 2. EXECUTOR AND ADMINISTRATOR, No. 6. PLEADING, v. 34, 35.

1. *A.* the mother of *B.* having entered

tered into a bond on his behalf for 1000*l.* *B.* executed an indemnity bond, of the same date, *viz.* 26th *April* 1800, in the sum of 2000*l.*, conditioned for the payment of 1000*l.* three months after her decease; on the 9th *February* 1801, *A.* made a codicil to her will, by which she relinquished two debts due from him, one of 1000*l.* and one of 500*l.*, and desired him to be punctual in indemnifying her estate against the 1000*l.* bond of the 26th *April;* three days after the execution of this codicil, *A.* executed a release to *B.*, in which, after mentioning a sum of 500*l.*, for which she had his bond, and two sums of 480*l.* and 300*l.* due to her from *B.*, for which she had receipts, expressed that she had agreed to release *B.* from those sums, "and of and from all and any other sum or sums of money, claims and demands thereby secured, or intended to be secured, and all other sum or sums of money, claim and demand whatsoever," and released him accordingly from those sums, and all claim on account of those sums, "or for or on account of any other matter, cause, or thing whatsoever:" held first, that this release did not extend to the indemnity bond. *Butcher* v. *Butcher*, *M.* 45 *G.* 3. 1 N. R. *page* 113

2. And, secondly, that no extrinsic evidence could be admitted to explain the intentions of *A.* as to the release. *ibid. ibid.*

3. *Semb.* That if the holder of a joint and several promissory note enter up judgment by *cognovit* against one of the makers, and levy part under a *fi. fa.* this is no discharge of the other. *Ayrey* v. *Davenport*, *T.* 47 *G.* 3.
2 N. R. *page* 474

RENDER,

See BAIL, ii. 1. iii.

RENT,

See DISTRESS. PAYMENT, No. 1.

RENT CHARGE,

See COSTS, i. 3, 4. PLEADING, v. 26.

RENT SERVICE,

See PLEADING, v. 27.

REPLEVIN,

See CORPORATION. COSTS, i. 9, 10. DISCONTINUANCE, No. 3. DISTRESS. PLEADING, ii. 14. iv. 6. 9. v. 13. 19. 26, 27. viii. 2. PRACTICE, iii. 14. v. 12. vii. 8.

1. The action on the case against the sheriff for taking insufficient pledges in *replevin*, ought to be brought in the name of the person making cognizance where there is no avowant on the record. *Page* v. *Sir J. Eamer, Knight, and Another*, *H.* 39 *G.* 3. 1 *B. & P.* 378

2. A *replevin* bond may, under the 11 *G.* 2. *c.* 19. be assigned to the avowant only, and he may bring his action upon it without joining the party making cognizance. *Archer and Others, Assignees, &c.* v. *Dudley and Others*, *E.* 22 *G.* 3. *B. R.* 1 *B. & P.* 381 *n.*

3. The Court will not stay proceedings in an action of *replevin* unless upon payment of the rent in arrear,

together with all costs, though the arrears were tendered before with costs up to that time. *Hopkins* v. *Shrole*, *H.* 39 *G.* 3.
1 *B.* & *P. page* 382

4. The condition of a *replevin* bond is not satisfied by a prosecution of the suit in the county court, but the plaint, if removed by *re. fa. lo.* into a superior Court, must be prosecuted there with effect, and a return made, if adjudged there. *Guillim* v. *Holbrook*, *E.* 39 *G.* 3. 1 *B.* & *P.* 410

5. If insufficient pledges *de retorno habendo* be taken by the officer of the court below in *replevin* the remedy against him is by action, and this court will not order him to pay the costs recovered by the Defendant in replevin. *Tesseyman* v. *Gildhart*, *T.* 45 *G.* 3. 1 N. R. 292

6. The Plaintiff having brought *replevin* for goods levied under a warrant of distress for an assessment made by a special sessions under the highway act, 13 *G.* 3. *c.* 78. *s.* 47. on the ground of the premises for which he was assessed, being situated without the township which was liable to repair the road; the Court refused to set aside the proceedings. *Fenton* v. *Boyle and Others*, *H.* 47 *G.* 3.
2 N. R. 399

REQUEST,

See Bye Laws.

RESCINDING CONTRACT,

See Lien, No. 5.

RESIGNATION BOND.

Judgment in *K. B.* in an action upon a resignation bond given by a school-master, affirmed in the Exchequer chamber, it not appearing upon the pleadings that the office was a freehold. *Lewis* v. *Legh*, *M.* 43 *G.* 3.
3 *B.* & *P. page* 231

RETURN OF PREMIUM,

See Insurance, ii. 1. 3, 4. iv.

RETURN OF WRITS,

See Time, No. 3.

REVENUE,

See Bills of Exchange and Promissory Notes, No. 12.

REVOCATION,

See Devise, iii. Estoppel, No. 3.

RIGHT, WRIT OF,

See Aid Prayer, No. 2. Nonsuit, Judgment as in Case of. Pleading, vi. 2, 3, 4.

1. The Court will not permit the *mise* joined in a writ of right to be tried by a jury, instead of the grand assize, though both parties desire it. *Galton* v. *Harvey*, *H.* 38 *G.* 3. 1 *B.* & *P.* 192

2. The Court will not give leave to amend the count in a writ of right, unless a favourable case be made out by affidavit. *Dumsday* v. *Sir R. Hughes and Another*, *T.* 43 *G.* 3. 3 *B.* & *P.* 453

3. The Court refused to allow the demandant in a writ of right to amend the mistake of a Christian name in the count, though an affidavit

davit accounting for the mistake was produced. *Charlwood* v. *Morgan*, *T.* 44 *G.* 3.

1 N. R. *page* 64

4. Or to discontinue the suit.

ibid. ibid.

5. The Court refused to permit the Demandant in a writ of right to amend his count by introducing an additional step in the descent, though it was sworn that the mistake had arisen from the Demandant having been misinformed in the country, and that the Demandant would be barred unless the amendment were allowed. *Baylis* v. *Manning*, *E.* 45 *G.* 3. 1 N. R. 233

6. The Court will not permit the Demandant in a writ of right to discontinue. *Maidment* v. *Jukes and Another*, *E.* 47 *G.* 3. 2 N. R. 429

ROMAN CATHOLICS,

See FRANKING.

RULE TO PLEAD,

See BAIL, ii. 17. PRACTICE, iii. 18. 21. 24.

RUSSIA,

See INSURANCE, iii. 5. SEAMEN'S WAGES, No. 4.

S.

SAILOR,

See WAGES.

SALE,

See CONSIGNOR AND CONSIGNEE, FRAUDS, STATUTE OF, No. 2. 4, 5, 6. 8. GOODS SOLD AND DELIVERED. LIEN, No. 9, 10. MONEY HAD AND RECEIVED, No. 8, 9. 12. SHIPS, No. 1. TITLE.

SALVAGE,

See EVIDENCE, ii. 35.

A ship being in danger, and the captain and part of the crew having made their escape, a passenger, at the request of the rest of the crew, took the command and brought the ship safe to port. The merits of the passenger in saving the ship were acknowledged by the owner in a letter to one of the underwriters, wherein he expressed his desire to make him a compensation: held that the passenger was entitled to sue the owner for salvage in an action of *indebitatus assumpsit*. *Newman* v. *Walters*, *H.* 44 *G.* 3. 3 *B.* & *P. page* 612

SATISFACTION,

See EAST INDIA COMPANY, No. 3.

SCHOOL-MASTER,

See RESIGNATION BOND.

SCIRE FACIAS,

See AMENDMENT, No. 6. 10.

SEAMAN,

See AGREEMENT, No. 9. COSTS, iii. 2.

1. *Semb.* That nothing but a power of attorney or will complying with the provisions of 26 *G.* 3. *c.* 63, and 32 *G.* 3. *c.* 34, will warrant the payment to third persons of money

due from the public to sailors and marines. *Macdonald* v. *Pasley*, *M.* 38 *G.* 3. 1 *B.* & *P. page* 161

SEAMAN'S WAGES,

See ENEMY, No. 1. PLEADING, v. 7. SLAVE. WAGES.

1. A seaman who quits his ship after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of the whole of his wages, under the 2 *G.* 2. *c.* 36. *s.* 3. *Frontine* v. *Frost*, *M.* 43. *G.* 3. 3 *B.* & *P.* 302

2. To entitle the master to deduct a month's wages for the benefit of *Greenwich* hospital under 2 *G.* 2. *c.* 36. *s.* 6 and 9. it is incumbent on him to shew that the seamen quitted his ship, without leave in writing. *ibid. ibid.*

3. And such a deduction cannot be set off by the master in an action for wages by the seaman, unless the master has previously debited himself to *Greenwich* hospital for the amount in a book kept according to the directions of the statute. *ibid. ibid.*

4. *Qu.* Whether the crews of the *British* ships detained in *Russia* under the orders of the *Russian* government in the year 1800, were entitled to wages for the time during which the ships were so detained? *Beale* v. *Thompson*, *E.* 43 *G.* 3. 3 *B.* & *P.* 405

5. Where the captain of a ship has accounted upon oath to the collector of the port for a sum of money, as the wages due to a deceased seaman, and paid the same to *Greenwich* hospital under 37 *G.* 3. *c.* 73. the representative of such seaman may still sue the captain for any wages due beyond the sum so paid. *Armstrong* v. *Smith*, *T.* 45 *G.* 3. 1 N. R. *page* 299

6. If a sailor execute the articles prescribed by 37. *G.* 3. *c.* 73. and serve accordingly, and during the voyage part of the cargo be plundered, but by whom cannot be ascertained, he does not, in consequence of such plunderage, forfeit his wages. *Thompson* v. *Collins*, *T.* 45 *G.* 3. 1 N. R. 347

7. *Semb.* That in such case he is not even liable to a proportionable deduction from his wages in common with the other sailors on account of such plunderage. *ibid. ibid.*

SEA-SHORE.

1. *Primâ facie* every subject has a right to take fish found upon the sea-shore between high and low water mark. *Bagott* v. *Orr*, *T.* 41 *G.* 3. 2 *B.* & *P.* 472

2. But such general right may be abridged by the existence of an exclusive right in some individual. *ibid. ibid.*

3. *Quære.* Whether there be a *prima facie* right in every subject to take fish shells found on the sea-shore between high and low water mark? *ibid. ibid.*

SECURITIES,

See EMBEZZLEMENT.

SEISIN,

See DOWER.

SENTENCE OF CONDEMNATION,

See EVIDENCE, ii. 24, 27, 28, 29. 37.

SERVICE,

See BAIL, ii. 5, 18. EJECTMENT. PRACTICE, i. 1. 9. 11.

SET-OFF,

See COSTS, iv. SEAMAN'S WAGES, No. 3.

SHERIFF,

See BAIL, i. 8. 10. 12. ii. ESCAPE. EVIDENCE, i. 3. ii. 4, 5. 33. PARTNERS, No. 3, 4, 5. PLEADING, v. 20. PRACTICE, i. 11. vi. 3. REPLEVIN, No. 1, TRESPASS, No. 2, 3. VENDITIONI EXPONAS.

SHIP,

See EVIDENCE, i. 4. FREIGHT. PLEADING, i. 6. ii. 16. SALVAGE. SEAMAN'S WAGES. WAGES.

1. The indorsement on the certificate of registry required by 7 & 8 *Will.* 3. *c.* 22. & 26 *Geo.* 3. *c.* 60. *s.* 16. need not be recited in the deed of assignment of a ship under *s.* 17. of the latter act. *Capadose* v. *Codnor*, *E.* 36 *G.* 3. 1 *B.* & *P. page* 483

2. A foreign built ship *British* owned is not required to be registered. *Long* v. *Duff*, *T.* 40 *G.* 3. 2 *B.* & *P.* 209

3. Such a ship may therefore sail without convoy, being within the exception of the convoy act, 38 *G.* 3. *c.* 76. *s.* 6. *Long* v. *Duff*, *T.* 40 *G.* 3. 2 *B.* & *P. page* 209

4. If a ship be chartered to the commissioners of the navy as an armed vessel, and an injury be done to another vessel by the misconduct of the persons on board the former, while a commander of the navy, and a King's pilot are on board, an action for the injury may be sustained against the owners of the chartered ship. *Fletcher and Others*, v. *Braddick and Others*, *E.* 46 *G.* 3. 2 N. R. 182

SHIP'S ARTICLES,

See AGREEMENT, No. 9.

SHIP'S REGISTRY,

See EVIDENCE, ii. 22. SHIP.

SIMILITER,

See AMENDMENT, No. 9. PRACTICE, v. 19.

SLANDER,

See DEFAMATION. LIBEL. PLEADING, ii. 10. v. 11. 25.

SLAVE.

Plaintiff agreed to serve as a seaman during a voyage to and from the *West Indies;* on his arrival there he was claimed as a runaway slave, and delivered up to his master; whereupon it was agreed between the Plaintiff, his master, and the captain, that upon payment of a sum of money by the captain to the master, the latter should manumit the Plaintiff, he covenanting to serve the captain

tain as a seaman for three years at certain stipulated wages. The Plaintiff was accordingly manumitted, and having served the captain on the homeward voyage, commenced an action against him to recover wages for that voyage upon a *quantum meruit:* held that he was estopped by his covenant from claiming more than the sum stipulated. *Williams* v. *Brown*, *H.* 42 *G.* 3. 3 *B.* & *P. page* 69

SLAVERY,

See PRACTICE, iv. 8.

SMUGGLING.

If goods prohibited from being sold in this country by 11 and 12 *Will.* 3. *c.* 10. are taken out of a warehouse and put on board a vessel as if for exportation, but in fact with a view to be re-landed, they are liable to be seized, though no actual attempt to re-land them has been made. *Wilson* v. *Saunders*, *E.* 38 *G.* 3. 1 *B.* & *P.* 267

SOAP,

See EXCISE.

STAMPS,

See BANKRUPT, iii. 17. EVIDENCE, iii. INSOLVENT, No. 5. POST OFFICE, No. 1.

1. A mere *cognovit* need not be stamped. *Ames* v. *Hill*, *E.* 40 *G.* 3. 2 *B.* & *P.* 150
2. But if it contain any terms of agreement it must. *ibid. ibid.*
3. An agreement to confess judgment for 30*l.* to secure 5*l.* and costs, is not an agreement for payment of more than 20*l.* within the 23 *G.* 3. *c.* 58. *s.* 4. and therefore need not be stamped. *Ames* v. *Hill*, *E.* 40 *G.* 3. 2 *B.* & *P. page* 150
4. An unstamped draft drawn on *A. B.* bricklayer, is not within the exception of 23 *G.* 3. *c.* 49. *s.* 4. in favour of drafts drawn on persons acting as bankers within 10 miles of the place where the draft is drawn. *Castleman* v. *Ray*, *E.* 41 *G.* 3. 2 *B.* & *P.* 383
5. A written agreement for the sale of the hops which shall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, cannot be given in evidence unless stamped with an agreement stamp; such an agreement not being within the exception of 23 *G.* 3. *c.* 58. *s.* 4. respecting agreements for the sale of goods, wares, and merchandizes. *Waddington* v. *Bristow*, *T.* 41 *G.* 3. 2 *B.* & *P.* 452
6. An unstamped banker's check post-dated is void. *Whitwell* v. *Bennett*, *M.* 44 *G.* 3. 3 *B.* & *P.* 559
7. A promissory note drawn before the 37 *G.* 3. *c.* 136. upon a receipt stamp of equal value with that required for a promissory note is not available in law. *Chamberlain* v. *Porter*, *E.* 44 *G.* 3. 1 N. R. 30
8. The assignment of a lease in writing without seal, did not require a stamp before the 44 *G.* 3. *c.* 98. *Hodges* v. *Drakeford*, *E.* 45 *G.* 3. 1 N. R. 270
9. If a number of persons severally bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matters, such bond requires

quires only one stamp. *Bowen* v. *Ashley*, E. 45 G. 3.
1 N. R. *page* 274

10. A defeazance upon a warrant of attorney does not require a separate stamp from that upon the warrant of attorney. *Cawthorne* v. *Holben*, E. 45 G. 3. 1 N. R. 279

STATUTE,
See BANKRUPT, i. 16.

STATUTE OF FRAUDS,
See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS,
See LIMITATIONS OF ACTIONS.

STATUTES CITED OR COMMENTED UPON.

Henry III.

20. c. 4. (Stat. Merton) 1 B. & P. 14
52. c. 9. (Stat. of Marlbridge) 2 B. & P. 272
c. 23. (Marlbridge) 1 B. & P. 108. 117

Edward I.

3. c. 35. (Stat. of Westminster I.) 1 B. & P. 76
6. c. 5. s. 13. (Stat of Gloucester, Waste) 1 B. & P. 108. 113. 116, 117
2 B. & P. 86
c. 8. (Stat. of Gloucester) County Court. 1 B. & P. 76
13. c. 2. (Stat. of Westminster, II.) 1 B. & P. 379
c. 14. (Westminster, II.) 1 B. & P. 108, 109. 111. 116. 121. 122
13. c. 46. (Stat. Westminster, II.) 1 B. & P. *page* 14
35. c. 2. (ne rector, &c.) 1 B. & P. 108. 113. 117. 119

Edward III.

4. c. 7. (Executors) 1 B. & P. 330

Henry IV.

4. c. 18. (Venue) 3 B. & P. 581

Henry V.

1. c. 5. (Additions) 3 B. & P. 396

Henry VI.

8. c. 12. (Amendment) 1 B. & P. 138
23. c. 9. (Bail Bond) 1 B. & P. 226
——— 2 B. & P. 36. 111
(Extortion) 2 N. R. 60

Edward IV.

12. c. 8. (Beer) 2 B. & P. 179

Henry VII.

3. c. 10. (Damages in Error) 1 B. & P. 29
4. c. 24. (Fine) 2 N. R. 19
19. c. 20. (Damages in Error) 2 N. R. 205

Henry VIII.

21. c. 7. (Embezzlement) 1 N. R. 3
c. 19. s. 3. (Costs) 2 B. & P. 376
(Avowry) 1 N. R. 61
23. c. 15. (Costs) 2 B. & P. 253
27. c. 10. (Uses) 1 B. & P. 577
28. c. 15. (High Seas) 2 N. R. 91
31. c. 1. (Partition) 3 B. & P. 380
32. c. 1. (Wills) 1 B. & P. 577

32. c. 7. (Monasteries)
2 N. R. *page* 498
c. 28. (Enabling statute)
2 N. R. 19
c. 32. (Partition) 3 B. & P. 380
34 & 35. c. 4. (Bankrupt)
2 B. & P. 9. *n.*
36. c. 36. (Fine) 2 N. R. 19

Edward VI.

1. c. 12. s. 10. (Larceny)
3 B. & P. 108
2 & 3. c. 13. (Tithes) 1 B. & P. 458
——— 2 N. R. 173
c. 24. s. 2. (Venue)
2 N. R. 91
3. c. 3. (Larceny) 3 B. & P. 108
3 & 4. c. 3. (Approvement)
1 B. & P. 14
5 & 6. c. 5. (Hops) 2 B. & P. 180

Philip and *Mary*.

1 & 2. c. 12. (Distress) 1 N. R. 248

Elizabeth.

8. c. 4. (Larceny) 3 B. & P. 108
13. c. 7. s. 1. (Bankrupt)
2 B. & P. 2. 9. *n.*
3 B. & P. 113
1 N. R. 234
c. 7. s. 11. (Bankrupt)
1 B. & P. 45. 48
c. 10. (Restraining statute)
1 B. & P. 114
2 B. & P. 189. 198
(Church Leases)
3 B. & P. 325
c. 20. (Church Leases)
3 B. & P. 328
14. c. 11. s. 15. (Church Leases)
3 B. & P. 325
18. c. 11. (Church Leases)
3 B. & P. 328
23. c. 1. (Recusancy)
3 B. & P. *page* 387
29. c. 4. (Extortion) 2 B. & P. 157
35. c. 1. (Recusancy) 3 B. & P. 387
43. c. 2. (Poor) 1 B. & P. 236
c. 6. (Costs) 1 N. R. 255
2 N. R. 471
c. 12. (Insurance) 2 N. R. 304

Jac. I.

1. c. 3. (Restraining statute)
1 B. & P. 114
c. 15. s. 6. (Bankrupt)
2 B. & P. 3. 9. *n.*
s. 13. (Bankrupt)
1 B. & P. 45
(Bankrupt) 3 B. & P. 113
c. 22. (Leather) 1 B. & P. 229
s. 10. (Leather) 2 N. R. 395
3. c. 8. (Bail in Error)
1 B. & P. 249
2 B. & P. 443
(Damages in Error)
2 N. R. 205
c. 15. (Court of Request)
2 B. & P. 589
7. c. 18. (Sea Sand) 2 B. & P. 478
21. c. 3. (Monopolies) 2 N. R. 202
c. 19. s. 2. (Bankrupt)
2 N. R. 80
s. 11. (Bankrupt)
1 B. & P. 82. 84.
2 N. R. 69
s. 14. (Bankrupt)
2 B. & P. 2. 9. *n.*

Common Wealth.

Act 1651. c. 22. (Navigation)
2 B. & P. 211
Act 1656. (Post-Office)
2 B. & P. 144

Car. II.

12. c. 18. (Navigation Act)
2 B. & P. *page* 212
3 B. & P. 35. 605
13. st. 2. c. 2. (Damages in Error)
2 N. R. 205
13 & 14. c 11. s. 6. (Foreign ships *English* owned) 2 B. & P. 213
c. 23. (Insurance) 2 N. R. 304
15. c. 7. s. 6. (*English* shipping)
2 B. & P. 213
16. c. 7. (Gaming) 2 B. & P. 53
16 & 17. c. 8. s. 3. (Bail in Error)
2 B. & P. 444
17. c. 7. (Distress) 1 B. & P. 380
22. c. 5. s. 3. (Larceny)
3 B. & P. 108
c. 11. s. 63. (Churches)
2 B. & P. 394
22 & 23. c. 1. s. 7. (*Coventry* Act)
3 B. & P. 107
c. 9. (Costs) 1 N. R. 268
2 N. R. 472
29. c. 3. s. 4. (Statute of Frauds)
1 B. & P. 159. 307. 397
2 N. R. 242. 416
s. 6. 1 B. & P. 580
3 B. & P. 19
s. 7. 1 B. & P. 377
s. 17. 2 B. & P. 238
3 B. & P. 234
1 N. R. 252
30. stat. 2. (Papists)
2 B. & P. 140. *et seq.*
31. c. 2. (*Habeas Corpus*)
2 B. & P. 531

William and Mary.

2. Sess. 1. c. 5. (Distress)
1 B. & P. 214
1. c. 20. (Land-Tax) 3 B. & P. 641
3. c. 9. s. 1. (Larceny)
3 B. & P. *page* 108
4. c. 1. (Land-Tax) 3 B & P. 641
4 & 5. c. 20. (Docketing Judgments) 1 B. & P. 308
c. 21. (Prisoners) 1 B. & P. 536
5. c. 21. s. 3. (Stamps) 1 N. R. 276
7 & 8. c. 22. (*English* shipping)
2 B. & P. 213
c. 22. s. 2. (Navigation Act) 3 B. & P. 605
11 & 12. c. 1. (Land-Tax)
3 B. & P. 641
c. 3. (Land-Tax)
3 B. & P. 642

William III.

7 & 8. c. 4. (Treating Act)
1 B. & P. 265
c. 22. (Ship Register)
1 B. & P. 483
2 B. & P. 213
8 & 9. c. 11. s. 2. (Costs)
2 B. & P. 253
s. 8. 2 N. R. 364
(Assigning breaches)
3 B. & P. 609
c. 27. (Prisoners)
1 B. & P. 538
c. 31. (Partition)
1 B. & P. 344
9 & 10. c. 15. (Arbitration)
2 B. & P. 445
3 B. & P. 245
c. 17. (Bills of Exchange)
2 B. & P. 82
c. 25. s. 37. (Stamps)
1 N. R. 276
c. 44. (*East-India* Company) 1 B. & P. 274
3 B. & P. 55

10 &

10 & 11. c. 23. s. 1. (Larceny) 3 B. & P. *page* 108
11 & 12. c. 10. (Bandannoes) 1 B. & P. 267
12 & 13. c. 3. s. 2. (Original Bill) 3 B. & P. 9

Anne.

1. c. 18. s. 5. *(Certiorari)* 3 B. & P. 357
2. c. 1. (Land-Tax) 3 B. & P. 641
3 & 4. c. 9. (Promissory Notes) 2 B. & P. 80. 415
4. c. 16. s. 5. (Costs) 2 B. & P. 368. 376
s. 9. (Attornment) 2 N. R. 19
s. 11. (Dilatory Pleas) 2 B. & P. 384
s. 11. (Abatement) 3 B. & P. 397
s. 20. (Bail-Bond) 3 B. & P. 222
c. 17. (Bankrupt) 2 B. & P. 9. *n.*
5. c. 8. art. 23. (Union) 2 B. & P. 143
c. 14. (Game) 1 N. R. 248
c. 22. (Bankrupt) 2 N. R. 197
s. 1. (Bankrupt) 2 B. & P. 3. 9. *n.*
s. 2. (Bankrupt) 2 B. & P. 7
6. c. 16. (*Irish* act attornment) 2 N. R. 19
8. c. 14. s. 1. (Rent) 1 B. & P. 366
9. c. 14. (Gaming) 2 B. & P. 52, 53
2 N. R. 414
c. 23. (Hackney Coaches) 3 B. & P. 385
10. c. 19. s. 19. (Soap Duty) 1 B. & P. 189
12. c. 7. (Larceny) 3 B. & P. 108
12. stat. 2. c. 9. s. 21. (Stamps) 1 N. R. *page* 276

George I.

1. c. v. (Priv. act, *All Souls'* College) 3 B. & P. 642
3. c. 12. (Bankrupt) 2 B. & P. 7
5. c. 24. (Bankrupt) 2 B. & P. 7. 9. *n.*
7. c. 21. (*East Indies*) 1 B. & P. 274
7. stat. 1. c. 21. s. 2. (*East India* trade) 1 B. & P. 3. 553
7. c. 31. s. 1. (Bankrupt) 2 B. & P. 2. 9. *n.*
8. c. 27. (Seaman's wages) 2 N. R. 209
9. c. 7. (Poor) 1 B. & P. 236
c. 22. (Black act) 3 B. & P. 107
1 N. R. 6
12. c. 29. (Affidavit of debt) 2 N. R. 199

George II.

2. c. 23. s. 23. (Attornies' Bill) 1 B. & P. 263
2 B. & P. 343
c. 25. (Larceny) 1 N. R. 3
(Forgery) 2 N. R. 93
c. 36. (Ship's articles) 2 B. & P. 116
s. 3. (Seaman's wages) 3 B. & P. 303
3. c. 14. (*East Indies*) 1 B. & P. 274
4. c. 28. (Tenant holding over) 1 B. & P. 310. 385. *n.*
(Double yearly value) 1 N. R. 174
5. c. 27. s. 4. (Process) 2 B. & P. 38
c. 30. (Bankrupt) 1 B. & P. 48. 95. 428. 450. 467

5. c. 30. (Bankrupt)
3 B. & P. *page* 185. 466
s. 7. (Bankrupt)
2 B. & P. 2. 9. *n.*
s. 23. 2 N. R. 197
s. 27. (Bankrupt)
2 B. & P. 4
s. 41. (Bankrupt)
2 B. & P. 4, 5
7. c. 8. (Stock-jobbing)
1 B. & P. 222
2 B. & P. 287
c. 21. (Assault with intent to rob) 3 B. & P. 107
c. 22. (Forgery) 3 B. & P. 313
9. c. 18. (Forgery) 2 N. R. 93
1 B. & P. 379
11. c. 19. (Replevin) 2 B. & P. 466
1 N. R. 56
c. 19. s. 8. (Distress) 2 N. R. 358
s. 13. (Ejectment)
1 B. & P. 570
s. 22. (Avowry)
1 B. & P. 78. 213
13. c. 19. (Horse-racing)
2 B. & P. 51
14. c. 10. (Court of Requests)
2 B. & P. 589
c. 15. (Judgment as in case of a nonsuit) 1 B. & P. 103
15. c. 13. s. 12. (Embezzlement)
1 N. R. 1
s. 11. (Bank notes)
1 N. R. 96
c. 28. s. 3. (Counterfeit money)
2 B. & P. 127
17. c. 17. (*East-Indies*)
1 B. & P. 274
18. c. 26. (*East-India Company*)
3 B. &. P. 55
c. 34. s. 11. (Horse-racing)
2 *B.* & P. 51
19. c. 32. s. 2. (Bankrupt)
2 B. & P. *page* 4, 5. 9. *n.*
3 B. & P. 237. 399
c. 37. (Insurance) 3 B. & P. 84
2 N. R. 277
20. c. 3. (House tax) 1 N. R. 281
21. c. 4. (Insurance) 3 B. & P. 194
22. c. 47. (Court of Requests, *Southwark*) 1 B. & P. 11
23. c. 21. s. 34. (Soap duty) 1 B. & P. 189
c. 33. s. 19. Court of Conscience, *Middlesex*)
1 B. & P. 12. 75. 223
2 B. & P. 29
24. c. 44. (Copy of warrant)
2 B. & P. 158
c. 44. (Notice of action)
3 B. & P. 551
c. 45. (Larceny) 3 B. & P. 108
30. c. 19. s. 1. (Stamps) 1 N. R. 276
31. c. 22. s. 78. (Forgery)
2 N. R. 93. *n.*
32. c. 28. (Lords' act)
1 B. & P. 92. 143. 270. 336. 423
3 B. & P. 184
1 N. R. 306
s. 11. (Extortion)
2 B. & P. 88
2 N. R. 59

George III.

3. & 4. c. 68. (Ships' registry)
2 B. & P. 217
4. c. 24. (Franking)
2 B. & P. 140. *et seq.*
5. c. 25. Post-office) 3 B. & P. 316
c. 43. s. 20. (Soap duty)
1 B. & P. 189
6. c. 40. s. 6. (*African trade*)
1 B. & P. 269
7. c. 50. (Post-office) 3 B. & P. 311
10. c. 23. (Paving rate) 3 B & P. 133

10. c. 44. s. 7. (Hackney coaches) 3 *B. & P. page* 385
c. 47. (*East-Indies*) 1 *B. & P.* 274
c. 50. s. 4. (Issues) 1 *B. & P.* 81
11. c. 22. (Paving rate) 3 *B. & P.* 131
12. c. 47. s. 2. (Bankrupt) 2 *B. & P.* 2. 5. 10
c. 71. (Forestalling) 2 N. R. 358
13. c. 44. s. 2. (*East-India* Company) 3 *B. & P.* 60
c. 51. s. 1. (*Wales*) 1 N. R. 267
c. 63. s. 44. (*India*) 1 *B. & P.* 177
c. 78. s. 19. (Highways) 2 *B. & P.* 392
s. 47. (Highway act) 2 N. R. 399
14. c. 77. (Bankrupt) 2 *B. & P.* 10
c. 78. (Party Walls) 1 *B. & P.* 303
16. c. 30. (Deer) 1 N. R. 6
c. 34. s. 1. (Stamps) 1 N. R. 276
17. c. 26. (Annuity) 1 *B. & P.* 62 208. 224. 396. 451. 482
1 N. R. 214
s. 2. 2 N. R. 141
c. 30. (Forgery) 3 *B. & P.* 313
c. 106. Turnpike Road) 2 *B. & P.* 219
19. c. 32. (Bankrupt) 2 *B. & P.* 398
c. 50. s. 16. (Stamps) 1 N. R. 276
20. c. 45. (Levant Bill) 1 *B. & P.* 351. n. (1)
c. 51. (Post horse duties) 1 *B. & P.* 51
21. c. 65. (*East-India* Company) 3 *B. & P.* 605
22. c. 33. (Stamps) 1 N. R. 31
23. c. 49. s. 4. (Stamps) 2 *B. & P.* 383
1 N. R. 31
23. c. 58. (Stamps) 2 *B. & P. page* 150. 452
1 N. R. 276
c. 70. s. 30. (Notice of Action) 3 *B. & P.* 552
24. sess. 2. c. 37. (Franking) 2 *B. & P.* 142
c. 44. s. 6. (Demand of a Copy of Warrant) 2 *B. & P.* 39
sess. 2. c. 47. Smuggling) 1 *B. & P.* 187. 267
c. 48. s. 10. (Soap duty) 1 *B. & P.* 189
25. c. 43. (Assessed Taxes) 2 *B. & P.* 391
c. 44. (Insurance) 1 *B. & P.* 319. 352
c. 80. (Attornies' Certificate) 1 *B. & P.* 4
3 *B. & P.* 382
26. c. 57. (*East-Indies*) 1 *B. & P.* 274
c. 60. (Ship registry) 1 *B. & P.* 483
2 *B. & P.* 211. *et seq.*
c. 63. s. 1. (Seamen) 1 *B. & P.* 161
27. c. 13. s. 41. (Stamps) 1 N. R. 31
c. 19. s. 8. (Ships' registry) 2 *B. & P.* 215
28. c. 56. (Insurance) 1 *B. & P.* 318. 346
31. c. 25. s. 4. (Stamps) 3 *B. & P.* 313. 560
1 N. R. 31
c. 32. (Franking) 2 *B. & P.* 141
c. 69. (Canal Act) 1 *B. & P.* 213
32. c. 34. s. 1, 2. (Seamen) 1 *B. & P.* 161

32. c 42. (Masters in Chancery)
3 *B. & P. page* 129
33. c. 5. (Insolvent) 1 *B. & P.* 423
c. 27. s. 4. (Insurance)
3 *B. & P.* 194
c. 52. (*East-India* Company)
1 *B. & P.* 273
3 *B. & P.* 60. 605
2 N. R. 435
c. 66. s. 3. (Prize)
3 *B. & P.* 86. 268
34. c. 9. (French property)
1 *B. & P.* 1
c. 68. (Ship Registry)
1 *B. & P.* 484
c. 69. (Insolvent Act)
1 *B. & P.* 477
35. c. 15. (Dutch Property)
3 *B. & P.* 81
c. 53. s. 1, 2, 3. (Franking)
2 *B. & P.* 142
c. 55. (Stamps) 1 N. R. 32
c. 63. s. 12. (Policy of Insurance)
2 N. R. 440
c. 80. (Dutch Commissioners)
3 *B. & P.* 75
2 N. R. 279
c. 77. (Bedford Level)
1 N. R. 187
c. 113. (Excise) 2 *B. & P.* 533
c. 121. (Prize) 3 *B. & P.* 268
c. 125. s. 7. (Prince of Wales)
2 N. R. 424
36. c. xiv. (Private Acts, Northwould Inclosure) 2 *B. & P.* 496
c. 33. (Bedford Level)
1 N. R. 189
37. c. 85. s. 2. (Prisoners)
1 *B. & P.* 336
c. 45. s. 9. (Bank Act)
1 *B. & P.* 132. 176. 344
2 *B. & P.* 48. 526
c. 70. (Inciting to mutiny)
1 *B. & P.* 180
37. c. 73. (Seaman's Wages)
2 *B. & P. page* 57
3 *B. & P.* 304
1 N. R. 299. 347
c. 85. (Insolvent) 1 N. R. 306
c. 90. (Stamps) 1 *B. & P.* 270
1 N. R. 32. 245. 276
s. 20. (Attornies' Certificate)
3 *B. & P.* 382
c. 97. (*American* treaty)
1 *B. & P.* 430
c. 107. (Assessed Taxes)
2 *B. & P.* 391
c. 109. s. 3. (Prize)
3 *B. & P.* 86
c. 112. (Insolvent Act)
3 *B. & P.* 326
c. 117. (*East-India* Trade)
3 *B. & P.* 36. 606
c. 123. (Unlawful Oaths)
1 N. R. 5
c. 136. (Stamps) 1 N. R. 32
c. cxliv. (Private acts) Croydon Inclosure) 2 *B. & P.* 89
38. c. 1. s. 8. (Bank Act)
3 *B. & P.* 7
c. 50. s. 9. (Aliens) 2 *B. & P.* 363
c. 76. s. 6. (Convoy Act)
2 *B. & P.* 209
c. 78. (Stamps) 2 N. R. 68
c. 87. (Executors) 3 *B. & P.* 26
39. c. 37. (High Seas) 2 N. R. 91
c. 85. (Embezzlement)
3 *B. & P.* 106. 316. 597
1 N. R. 5
c. 113. (Serjeants)
2 *B. & P.* 13
39. & 40. c. 72. (Attornies' Certificate) 3 *B. & P.* 386
c. civ. Local and Personal Acts. (Court of Requests) 2 B. & P. 588
1 N. R. 153
41. c. 70. (Insolvent Act)
3 B. & P. 394

41. c. cxxv. (Local and Personal Acts. Koop's Patent) 3 B. & P. 566
43. c. 46. s. 3. (Bail) 2 N. R. 76
c. cxxxiv. s. 37. (Loc. & Pers. Acts, Coals) 2 N. R. 260
c. 160. s. 40. (Admiralty) 2 N. R. 229
44. c. 78. (Stamps) 1 N. R. 272

STAYING AND SETTING ASIDE PROCEEDINGS,

See Affidavit to hold to Bail, No. 22. Annuity, No. 11. Bail, ii. v. 4. Baron and Feme, No. 8. Bond, No. 1, 2. Consignor and Consignee, No. 2. Costs, iii. Practice, vii. Replevin, No. 3. Trial. Variance, No. 2.

STOCK-JOBBING,

See Money had and received, No. 7. Pleading, v. 11, 12.

STOPPAGE IN TRANSITU,

See Lien.

SUBJECT.

1. A natural-born subject of this country admitted a citizen of the United States of *America*, either before or after the declaration of the *American* independence, may be considered a subject of the United States, so as to be entitled to any commercial privileges granted to the subjects of the United States by treaty. *Marryatt* v. *Wilson in Error*, *E.* 39 *G.* 3.
1 *B.* & *P.* 430

2. Even though the subjects of this country be prohibited from exercising those privileges.
1 *B.* & *P. page* 430

SUGGESTION,

See Courts.

SUMMONS,

See Practice, v. 20.

SUPERSEDEAS,

See Practice, x. 1. 5. Prisoner, No. 2. 4, 5.

SURETY,

See Condition, No. 3, 4, 5. Contribution. Guaranty. Pleading, v. 29.

SURRENDER,

See Bail, i. 4. ii. 10. 15. iii.

T.

TAXATION,

See Attorney's Bill, No. 4.

TAXES,

See Land-Tax. Rate.

If a constablewick consist of several hamlets, and two collectors of the duties on houses, &c. are appointed for each hamlet, and the collector or collectors of any one hamlet fail in duly paying over the money collected, the particular hamlet only where the collector or collectors

collectors have failed is liable to a re-assessment under 20 *G.* 2. c. 3. and not the whole constablewick. *Barrs* v. *Digby*, *E.* 45 *G.* 3.
1 N. R. *page* 281

TENANT-RIGHT ESTATE,
See PARTITION, No. 2.

TENANTS,
See LANDLORD AND TENANT.

TENDER,
See AFFIDAVIT TO HOLD TO BAIL. PLEADING, v. 18. 23.

1. If Defendant bring money into Court on a plea of tender, Plaintiff may take it out, though he reply that the tender was not made before action brought. *Le Grew* v. *Cooke*, *M.* 39 *G.* 3. 1 *B.* & *P.* 332
2. Bank Notes are not made legal tender by the 37 *G.* 3. *c.* 45. *Grigby* v. *Oakes*, *M.* 42 *G.* 3.
2 *B.* & *P.* 526

TIME,
See GUARANTY, No. 1, 2. PRACTICE, iii. 7. 12. 21. 28. iv. 5. v. 18. 20.

1. Reasonable time is a question of law. *Scheibel* v. *Fairbain*, *E.* 39 *G.* 3. 1 *B.* & *P.* 388
2. If the grantee of a market under letters patent from the Crown suffer another to erect a market in his neighbourhood, and use it for the space of 23 years without interruption, he is by such user precluded from maintaining his action on the case for disturbance of his market. *Holcroft* v. *Heel*, *E.* 39 *G.* 3. 1 *B.* & *P. page* 400
(See 3 *East*, 298.)
3. In a penal action a *capias ad respondendum* issued within a year after the offence committed, but was never served on the Defendant, or returned; after the expiration of the year, but in the same term, a *capias per continuance* issued, and was duly served and returned; the declaration was of the term in which both writs issued: held that the first writ not having been returned, could not be connected with the second so as to support the action. *Stanway q. t.* v. *Perry*, *E.* 40 *G.* 3. 2 *B.* & *P.* 157

TITHES,
See EVIDENCE, ii. 12. GAVELKIND.

1. If a composition for tithes be made by *A.* as proprietor, and he lease them to *B.*, whose interest is afterwards put an end to by *A.*, before any alteration is made in the composition, *A.* cannot determine it without six months' notice. *Wyburd* v. *Tuck*, *T.* 39 *G.* 3.
1 *B.* & *P.* 458
2. If *A.* execute a lease of tithes to *B.* on a day subsequent to their severance, but previous to their being carried away by the landholder, *B.* cannot maintain an action on the 2 & 3 *Ed.* 6. *c.* 13. as the right to the tithe vested in *A.* immediately on severance.
ibid. *ibid.*
3. *Qu.* Whether if one only of two joint-tenants execute an assignment of a lease of tithes, the person claiming under that lease can support

port an action for not setting them out? *Wyburd* v. *Tuck*, *T.* 39 *G.* 3. 1 *B. & P. page* 458

4. Hops are by law titheable after they are picked from the bind. *Knight* v. *Halsey in Error*, *E.* 40 *G.* 3. 2 *B. & P.* 172

5. No usage can vary this rule. *ibid. ibid.*

6. No evidence is sufficient to support a real composition, unless it have some reference to a deed of composition. *ibid. ibid.*

7. In debt for subtraction of tithes of any particular article, the Plaintiff, though he allege the tithe of that article to have been "granted, yielded, and paid, and of right due and payable," on the land in question 40 years next before the making of the stat. of *Ed.* 6., need not prove that the particular article was cultivated there at that time; but it lies on the Defendant to prove that it was not. *Hallewell, Clerk*, v. *Trapps*, *E.* 46 *G.* 3. 2 N. R. 173

8. A parson is not entitled to carry his tithes home by every road which the farmer himself uses for the occupation of his farm. *Semb.* that he may only use such road as the farmer does for the occupation of the close in which the tithes grew. *Cobb, Clerk*, v. *Selby*, *T.* 47 *Geo.* 3. 2 N. R. 466

TITLE,

See BANKRUPT, iii. 16. MONEY HAD AND RECEIVED, No. 8, 9. 11. PLEADING, vi.

The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement, of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud he the purchaser was ignorant. *Doe d. Bothell* v. *Martyr*, *T.* 45 *G.* 3. 1 N. R. *page* 332

TOLL,

See MARKET. MORTGAGE. PLEADING, ii. 9.

If toll be merely claimed of the individual members of a corporation exempt from toll, an action will lie on the writ *de essendo quietum de Theolonia* in the name of the corporation. *The Mayor*, &c. *of London* v. *The Mayor*, &c. *of Lynn*, *E.* 36 *G.* 3. 1 *B. & P.* 487

TOWING-PATH,

See INCLOSURE ACT.

TRADE,

See BANKRUPT, i. 2. 5. INSURANCE, iv. 2. LICENCE. SUBJECT.

1. Under the treaty concluded in 1795 between this country and the United States of *America*, confirmed by 37 *G.* 3. *c.* 97. it is not necessary that the trade conceded to the *Americans* by the 13th article should be direct from *America* to the *British* settlements in the *East Indies*. *Marryatt* v. *Wilson, in Error*, *E.* 39 *G.* 3. 1 *B. & P.* 430

2. It may be carried on circuitously through any country in *Europe*, including *Great Britain*. *ibid. ibid.*

TRADER,

TRADER,

See BANKRUPT, i. 5.

TREATING.

It being contrary to the 7 & 8 *W.* 3. *c.* 4. for a candidate to furnish provisions to any voter after the *teste* of the writ, an innkeeper cannot recover against a candidate for provisions so furnished at his request. *Ribbans* v. *Crickett*, *E.* 38 *G.* 3. 1 *B.* & *P. page* 264

TREES,

See COMMON. EXECUTOR AND ADMINISTRATOR, No. 5.

Certain lands, together with the woods, &c. were conveyed under a marriage settlement to *A.* and *B.*, their heirs and assigns, during the life of *S. W.*, in trust to pay the rents and profits as the said *S. W.* should appoint during her life, and after her decease to the use of such child or children of the marriage, and in such shares as the said *S. W.* should appoint; and for want of appointment, to the use of the children equally, &c. and the heirs of their bodies, with cross remainders; and in default of such issue, to the use of the right heirs of *S. W.* for ever: held, that *A.* and *B.* had only an estate during the life of *S. W.*, and therefore could not maintain trover against the Defendant, a stranger, for trees which had been cut down by order of the husband of *S. W.*, and carried away by the Defendant. *Blaker and Another* v. *Anscombe*, *E.* 44 *G.* 3. 1 N. R. 25

TRESPASS,

See ARREST, No. 2. DAMAGES. EXECUTOR AND ADMINISTRATOR, No. 5. PLEADING, i. 5, 6, 7. v. 15. PRACTICE, iii. 15. v. 21.

1. A private person may justify breaking and entering the house of another, and imprisoning his person in order to prevent him from committing murder on his wife. *Handcock* v. *Baker*, *T.* 40 *G.* 3. 2 *B.* & *P. page* 260
2. If the judgment of commissioners of appeal in certain cases be declared final by statute, their judgment cannot be questioned in an action of trespass. *The Earl of Radnor* v. *Reeve*, *E.* 41 *G.* 3. 2 *B.* & *P.* 391
3. *Semb.* that a sheriff's officer acting under civil process may justify breaking the inner doors of the Defendant's house, though he be not therein at the time. *Ratcliffe* v. *Burton*, *M* 43 *G.* 3. 3 *B.* & *P.* 223
4. But in such case the officer must first demand admittance. *ib. ib.*

TRIAL,

See AMENDMENT, 9. NEW TRIAL. PRACTICE, iv. VENUE.

TROVER,

See BANKRUPT, ii. 1. iii. 6. BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 3. 20. EVIDENCE, ii. 22. INTEREST OF MONEY, No. 4. LIEN. PLEADING, i. 4. TREES.

1. *A.* entrusted *B.* with goods to sell in *India*, agreeing to take back from *B.* what he should not be able to sell, and allowing him what he should obtain beyond a certain

price, with liberty to sell them for what he could get, if he could not obtain that price, *B.* not being able to sell the goods in *India* himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in *England:* held, that *A.* could not maintain trover against *B.* for the goods. *Bromley* v. *Coxwell, E.* 41 *G.* 3.

2 *B.* & *P. page* 438

2. *A.* having agreed to purchase of *B.* the remainder of a term, the latter delivered to him the lease in order to get an assignment made out; *A.* then obtained an enlargement of the term from the original landlord, and refused to accept an assignment, or pay the full price agreed on, because *B.*'s undertenant had removed some fixtures: held, that *B.* might insist on *A.* accepting the assignment, and after demand and refusal of the lease might maintain trover for it. *Parry* v. *Frame, T.* 41 *G.* 3. 2 *B.* & *P.* 451

TURNKEY,

See HABEAS CORPUS, No. 1, 2. INSOLVENT, 16.

TRUST,

See BANKRUPT, iii. 10. DEVISE, i. 10. EXECUTION, No. 3.

TRUSTEE,

See BARON AND FEME, No. 12, 13. COVENANT, No. 9. DEVISE, i. 10. EJECTMENT, No. 7. PLEADING, ii. 5. v. 6. vi. 1. TREES.

1. If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit. *Ex parte Grace, H.* 39 *G.* 3. 1 *B.* & *P. page* 376

2. But if it do not prove beneficial he must take it upon himself, *ib. ib.*

TURNPIKES,

See MORTGAGE.

U.

UNIVERSITIES,

See LAND TAX.

USAGE,

See LIEN. TITHES, No. 4, 5.

USE AND OCCUPATION,

See COURTS, No. 7.

USURPATION,

See QUARE IMPEDIT.

USURY,

See AMENDMENT, No. 7. DISCONTINUANCE, No. 2. EVIDENCE, ii. 31. PRACTICE, iii. 8.

1. *A.* being a banker in the country, discounts bills at four months for *B.* and takes the whole interest for the time they have to run; *B.* on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash, and part by bills on *London*, some at three, some at seven, and some at thirty days' sight: held not to be an usurious transaction, so as to induce the Court to grant a new trial, since the surplus of interest taken by *A.* might be referable to the expences of remittance. *Sir B. Hammett, Knt. and Others* v. *Sir W. Yea, Bart. M.* 38 *G.* 3. 1 *B.* & *P.* 144

2. *Secus,*

2. *Secus*, if such mode of remittance had been made a term of the loan. *Sir B. Hammett, Knt. and Others*, v. *Sir W. Yea, Bart. M.* 38 *G.* 3. 1 *B. & P. page* 144

3. The Court set aside a warrant of attorney and judgment given to secure a loan which was sworn to be usurious in order to bring the question of usury before a jury, but refused to order a bill of Exchange to be delivered up which had been given to procure the Defendant's release out of execution on the judgment. *Edmonson* v. *Popkin*, *E.* 38 *G.* 3.

1 *B. & P.* 270

4. *A.* lent *B.* 500*l.* and at the time of the loan it was agreed, that the latter should give something more than legal interest as a compensation; but no particular sum was specified. After the execution of the deed *B.* gave *A.* 50*l.* and paid interest at the rate of 5*l. per cent.* on the 500*l.* for five years, at the end of which time an action was brought against *A.* for usury; held that the action was not barred by lapse of time, for that the loan was substantially for no more than 450*l.*, and consequently the interest at the rate of 5*l. per cent.* on the 500*l.* received within the last year was usurious. *Scurry q. t.* v. *Freeman*, *E.* 41 *G.* 3.

2 *B. & P.* 381

5. If a draft be given for usurious interest, and a receipt taken for it in the county of *A.*, and the draft be afterwards exchanged for money in the county of *B.* the usury is committed in the county of *B.* and the venue must be laid there. *ibid. ibid.*

6. The grantor of an annuity having agreed with the grantee to redeem, drew a bill of Exchange for 5000*l.* at three years which the grantee discounted in the following manner: he took 4063*l.* 6*s.* 8*d.* as the amount of the purchase money and arrears, advanced 166*l.* 13*s.* 4*d.* to the grantor in cash, and took 750*l.* as interest for three years upon 5000*l.* Held that the transaction was usurious. *Sir C. Marsh* v. *Martindale*, *E.* 42 *G.* 3.

3 *B. & P. page* 154

7. If more than legal interest be taken for forbearance on a note given to *A.* by *B.* as a collateral security for money lent to *C.*, such money is well described to be for forbearance of money lent by the Defendant to *B.* *Manners q. t.* v. *Postan*, *H.* 43 *G.* 3.

3 *B. & P.* 343.

UTTERING,

See EVIDENCE, ii. 30. FORGERY.

V.

VARIANCE,

See AGREEMENT, No. 6. AMENDMENT, No. 3. DETINUE. EVIDENCE, ii. 25, 26. INSURANCE, i. 7. 9. MISNOMER. PLEADING, ii. 16. v. 7. 10. 17. 22. 36. vi. 3. viii. 2.

1. The Plaintiff a sailor declared for 52*l.* 10*s.* for run money, and gave in evidence a note for 52*l.* 10*s.* for run money, with an additional stipulation written after signature of the note, for a pint of rum per day, and it was held no variance. *Baptiste* v. *Cobbold*, *E.* 37 *G.* 3.

1 *B. & P.* 7

2. The Court will not set aside proceedings for irregularity where the plaintiff sues out a *quare clausum fregit* against two, and declares against one only. *Spencer* v. *Scott*, *E.* 37 *G.* 3. 1 *B.* & *P. p.* 19

3. In cases of process not bailable, the writ may be against several Defendants, and the declaration against one only. *Stables and Another* v. *Ashley and Others*, *E.* 37 *G.* 3. 1 *B.* & *P.* 49

4. In cases of bailable process it is otherwise. *ibid. ibid.*

5. Arrest by the name of "*Weston*" declaration *de bene esse* against "*Wason*," sued by the name of "*Weston*;" and held regular. *Symmers* v. *Wason*, *M.* 38 *G.* 3. 1 *B.* & *P.* 165

6. Evidence of a house situate in the parish of *M.* will support an averment of a house at *S.*, *S.* being extra-parochial, and both places usually going by the name of *S.* *Burbige* v. *Jackes*, *E.* 38 *G.* 3. 1 *B.* & *P.* 225

7. If process be served in the name of one Plaintiff, and a declaration be delivered in the name of two, it is bad. *Rogers* v. *Jenkins*, *H.* 39 *G.* 3. 1 *B.* & *P.* 383

8. Copy of a writ against *William Armytage*: notice to appear "*Catherine Waller* you are served, &c." mistake held fatal. *Jones* v. *Armytage*, *M.* 40 *G.* 3. 2 *B.* & *P.* 38

9. An agreement entered into between *A.* and *B.* respecting a horse-race was indorsed "N. B. to start p. p. 15 days from this date." In a declaration on this agreement no notice was taken of the indorsement, and no evidence was given at the trial to explain the meaning of the letters "p. p." The Court after verdict held the variance between the agreement declared on, and that given in evidence was not material, the letters "p. p." being insensible. *Whaley* v. *Pajot*, *M.* 40 *G.* 3. 2 *B.* & *P. page* 51

10. In an action for non-residence the parish was stiled in the declaration *St. Ethelburg*; evidence was given that the real name was *Ethelburga*: held a fatal variance. *Wilson q. t.* v. *Gilbert Clerk*, *M.* 41 *G.* 3. 2 *B.* & *P.* 281

11. If the writ be that the defendant answer in "a certain plea of trespass on the case on promises," and the declaration be in debt for goods sold and delivered, and money borrowed, the Court will discharge the defendant on entering a common appearance. *Kerr* v. *Sheriff*, *H.* 41 *G.* 3. 2 *B.* & *P.* 358

12. If a bill drawn by *John Crouch* be declared upon as drawn by *John Couch*, the variance is fatal. *Whitwell* v. *Bennett*, *M.* 44 *G.* 3. 3 *B.* & *P.* 559

13. The Plaintiff having declared upon an agreement to deliver soil or breeze, proved that the Defendant agreed to deliver soil, held that he could not recover on account of the variance. *Cooke* v. *Munstone*, *T.* 45 *G.* 3. 1 N. R. 351

14. Affidavit of debt against *A.*; capias against *A.* and *B.* and declaration against *A.* only; by whom bail was put in; held regular. *Forbes* v. *Phillips*, *H.* 46 *G.* 3. 2 N. R. 98

15. Defendant was served with a writ styling

styling him, "*John*;" he did not appear but Plaintiff entered a common appearance for him, and declared against him conditionally by the name of "*William* sued by the name of *John*;" held irregular. *Greenslade* v. *Rotheroe*, *H.* 46 *G.* 3. 2 N. R. *page* 132

16. *Quære.* Whether if a declaration in *assumpsit* state the condition to be certain reasonable reward, evidence that a specific sum was agreed upon will be deemed a variance? *Semb.* not. *Bayley* v. *Tucker*, *T.* 47 *G.* 3. 2 N. R. 458

17. Trespass *quare clausum fregit*, justification under a *distringas* in a plea of trespass at the suit of *J. S.* against Defendant. Replication, that before the *distringas* issued against Defendant he appeared to answer *J. S.* in the plea of trespass in the said plea mentioned, to the said writ sued out by *J. S.* for that purpose, to wit, a *clausum fregit* issued out of *C. B. prout patet*, &c. Defendant rejoined *nul tiel* record. Held that the record of appearance to a *clausum fregit* issued out of Chancery did not support the replication, and that the words which followed the *scilicet*, being material, could not be rejected. *Myers* v. *Kent*, *T.* 47 *G.* 3. 2 N. R. 463

18. Bailable process against two, and declaration against one only. The Court set aside the declaration for irregularity; though it had been taken out of the office by him against whom it was filed. *Chapman* v. *Eland and Another*, *M.* 46 *G.* 3. 2 N. R. 82.

VENDITIONI EXPONAS.

The Court refused to grant an attachment against the sheriff, because he had returned to a writ *venditioni exponas*, that part of the goods levied remained in his hands for want of purchasers. *Leader* v. *Danvers*, *M.* 39 *G.* 3.

1 *B.* & *P. page* 359

VENDOR AND VENDEE,

See CONSIGNOR AND CONSIGNEE. GOODS SOLD AND DELIVERED, LIEN. MONEY HAD AND RECEIVED, No. 9. TITLE. TROVER, No. 2.

VENIRE DE NOVO,

See INSURANCE, i. 12.

VENUE,

See CONSIGNOR AND CONSIGNEE, No. 2. EVIDENCE, ii. 34. INDICTMENT, No. 7. PLEADING, v. 9. USURY, No. 5.

1. In an action on a promissory note the Court will not change the venue from *London* to the county where it was made, on the Defendant's stating that all his witnesses live there. *Evans* v. *Weaver*, *E.* 37 *G.* 3. 1 *B.* & *P.* 20.

2. But if his affidavit shew the number of his witnesses, and that a serious inconvenience would arise from bringing them up, it will. *ibid. ibid.*

3. The Court will not change the venue in an action on a deed to the county where it was executed on the ground of the Defendant's witnesses residing there, if from the pleadings it does not appear necessary to produce many witnesses from that county unless a question should be raised of which a fair trial cannot be expected there. *Watt* v. *Daniel*, *E.* 39 *G.* 3.

1 *B.* & *P.* 425

4. Taking

4. Taking out a summons for further time to plead is no waver of the Defendant's right to move to change the venue. *Wilson* v. *Harris*, *M.* 41 *G.* 3. 2 *B.* & *P. page* 320

5. It seems the Court will not change the venue in an action on an award; even though the declaration contain the common counts. *Whitburn* v. *Staines*, *H.* 41 *G.* 3. 2 *B.* & *P.* 355

6. Nor will they oblige the Plaintiff to undertake to give evidence on the count upon the award. *ibid. ibid.*

7. After plea pleaded the venue cannot be changed. *Talmash* v. *Penner*, *H.* 42 *G.* 3. 3 *B.* & *P.* 12

8. But if the Defendant plead pending a rule *Nisi* for changing the venue, the Court will notwithstanding allow him to change the venue. *ib. ib.*

9. An application to change the venue from *A.* to *B.* in an action for goods sold and delivered, upon an affidavit that the cause of action arose at *B.* and not elsewhere, may be successfully answered by an affidavit that the goods were sold at *C.* *Collins* v. *Jacobs*, *M.* 44 *G.* 3. 3 *B.* & *P.* 579

10. The Court will not discharge a rule for changing the venue from *A.* to *B.* upon an affidavit, shewing that the cause of action arose partly in *A.* and partly in *B.*, and that all the witnesses reside in *A.* But the Plaintiff must undertake to give material evidence in *A.* *Henshaw* v. *Rutley*, *M.* 45 *G.* 3. 1 N. R. 110

11. It is no answer to an application to change the venue from *London* to *Middlesex*, on the usual affidavit, in an action commenced by assignees, that the commission was issued, and the bankruptcy declared in *Middlesex*, and the assignees chosen in *London*. But in such case the Plaintiffs can only retain their venue by undertaking to give material evidence where it is laid. *Clarke* v. *Reed*, *T.* 45 *G.* 3. 1 N. R. *page* 310

12. Defendant having put off the trial at the assizes on the absence of a witness, the Court refused to let the Plaintiff change the venue to *Middlesex*. *Pearse* v. *Porklington*, *M.* 46 *G.* 3. 2 N. R. 58

13. The Court discharged a rule for changing the venue upon an affidavit of the Plaintiff, that the cause of action arose principally in *Ireland*. *Hope* v. *Bennet*, *H.* 47 *G.* 3. 2 N. R. 397

VERDICT,

See AMENDMENT, No. 7. INSURANCE, i. 16. NEW TRIAL, No. 2, 3. PLEADING, v. 29. 34. viii PRACTICE, iv. 4. 11.

1. Where a general verdict has been given on two counts, one of which is bad, and it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good count only, the Court will amend the verdict by entering it on that count, though evidence was given, applicable to the bad count also. *Williams*, *Executor*, *&c.* v. *Breedon*, *M.* 39 *G.* 3. 1 *B.* & *P.* 329

2. The Court will not set aside a verdict upon the affidavit of a juryman that it was decided by lot. *Owen* v. *Warburton*, *T.* 45 *G.* 3. 1 N.R. 326

VOLUNTARY SETTLEMENT,

See TITLE.

WAGES,

W.

WAGES,

See PLEADING, iv. 5. v. 7. SEAMAN'S WAGES. SLAVE.

1. The 37 *Geo.* 3. *c.* 73. *s.* 3. having prohibited more than double monthly wages, being given to a seaman coming from the *West Indies*, unless the captain be specially licensed to give a greater rate by the chief officer of the port; a general licence by such chief officer to a captain "to procure men on such terms as he can," is void. *Rodgers* v. *Lacy*, *H.* 40 *G.* 3.
2 *B.* & *P. page* 57

2. A sailor, in addition to the wages contained in the ship's articles, sued for the average price of a negro slave, for which he had agreed with the captain, though no mention of such perquisite was made in the articles: held that the contract for the average price of a negro slave was void; such additional perquisite being in fact wages, and therefore only to be recovered where included in the articles, according to 2 *Geo.* 2. *c.* 36. *White* v. *Wilson*, *H.* 40 *G.* 3.
2 *B.* & *P.* 116

WAGER,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 11.

No action will lie on a wager, though above 50*l.*, that a single horse shall run on the high road from *A.* to *B.* and arrive sooner than one of two horses placed at any distance the owner shall please; such a race not being legalized by the 13 *G.* 2. *c.* 19. and 18 *G.* 2. *c.* 34. *s.* 11. *Whaley* v. *Pajot*, *M.* 40 *G.* 3. 2 *B.* & *P.* 51

WALES,

See ACTION PERSONAL.

WARRANT,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, No. 12. OFFICER.

WARRANT OF ATTORNEY,

See ANNUITY, No. 8. BARON AND FEME, No. 8, 9. COMMON RECOVERY, No. 2. 4. 8. ENLMY, No. 2. EVIDENCE, ii. 14. PRACTICE, ii. 4. STAMPS, No. 10. USURY, No. 3.

1. If a Defendant in custody being about to execute a warrant of attorney to confess judgment be informed that it must be done in the presence of an attorney on his part, and thereupon produce a person as such, in whose presence he executes the warrant of attorney, the Court will not set aside the proceedings thereon, because the person so produced by the Defendant was not an attorney. *Jeys, One, &c.* v. *Booth*, *M.* 38 *G.* 3.
1 *B.* & *P. page* 97

2. No judgment can be signed upon any warrant authorizing an attorney to confess judgment without such warrant being delivered to, and filed by the clerk of the docquets; who is to file the same in the order in which they are received. *Reg. Gen. M.* 43 *G.* 3.
3 *B.* & *P.* 310

3. Every attorney of C. B. who shall prepare any warrant of attorney to confess any judgment which is to be subject to any defeasance, must cause such defeasance to be written on the same paper or parchment on which the warrant of attorney is written, or cause a memorandum in writing

writing to be made on such warrant containing the substance and effect of such defeasance. *Reg. Gen. M.* 43 *G.* 3.
3 *B. & P. page* 310

WARRANTY,
See CARRIER. COVENANT, No. 4. EVIDENCE, ii. 24. 27, 28, 29. 37. iii. 2. INSURANCE, ii. 9. iii. 1, 2. 4.

WASTE,
See ACTION ON THE CASE, No. 6. COPYHOLD, No. 1. PROHIBITION.

1. In an action of waste on the stat. of *Gloucester*, against tenant for years, for converting three closes of meadow into garden-ground, if the jury give only one farthing damages for each close, the Court will permit the Defendant to enter up judgment for himself. *The Keepers and Governors of Harrow School* v. *Alderton*, *H.* 10 *G.* 3.
2 *B. & P.* 86

2. And this principle holds whether the waste consist in the alteration of the property, or in the deterioration of it. *ibid. ibid.*

WAVER,
See PRACTICE, ix. VENUE, No. 4.

WAY, RIGHT OF.

One being seized in fee of the adjoining closes *A.* and *B.* over the former of which a way had immemorially been used to the latter, devises *B.* "with the appurtenances;" held that the devisee cannot under the word "appurtenances," claim a right of way over *A.* to *B.*, as no new right of way is thereby created, and the old one was extinguished by the unity of seisin in the devisor. *Whalley* v. *Thompson and Another*, *H.* 39 *G.* 3. 1 *B. & P. page* 371

WAYS,
See GRANT. INCLOSURE ACT. TITHES, No. 8.

WEST INDIES,
See WAGES, No. 1.

WHARFINGER,
See LIEN, No. 10.

WILL,

It is not necessary to the validity of the execution of a will of lands by blind man that it should be read over to him in the presence of the attesting witnesses. *Longchamp d. Goodfellow* v. *Fish*, *E* 47 *G* 3.
2 N. R. 415

WITNESS,
See EVIDENCE, i. ii. 7. 11. PRACTICE, iv. 1. 3, 4, 5. 8. WILL.

WORDS,
See DEFAMATION. EVIDENCE, ii. 32. PLEADING, ii. 10. v. 25.

WRIT,
See ABATEMENT, No. 1, 2. ADDITIONS.

WRIT OF ERROR,
See ERROR, WRIT OF. PRACTICE, x.

WRIT OF INQUIRY,
See PRACTICE, iv.

WRIT OF RIGHT,
See RIGHT. WRIT OF.

END OF THE SECOND VOLUME.

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